17-414

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 231.

THOMAS J. WOOD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 18, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 231.

THOMAS J. WOOD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	6	3
Findings of fact and conclusion of law	7	4
Opinion of the court	10	8
Final judgment of the court	13	11
Application for and allowance of an appeal	14	11
Certificate	15	11

1 United States Court of Claims.

I. *Claimant's petition.—Filed September* 10, 1879.—A. H.

THOMAS J. WOOD
vs.
THE UNITED STATES. } No. 12074.

To the honorable Court of Claims:

The petition of Thomas J. Wood, of Dayton, Montgomery County, Ohio.

Your petitioner is an officer of the United States Army on the retired list, and is a citizen of the State of Ohio and of the United States, residing at Dayton, in the county of Montgomery, State of Ohio.

On the 1st day of July, 1845, your petitioner graduated from the United States Military Academy, and was appointed a second lieutenant by brevet in the corps of Topographical Engineers; transferred to Second Dragoons October 9, 1846; promoted second lieutenant, December 2, 1846; first lieutenant, June 30, 1851; captain First Cavalry, March 3, 1855; major, March 16, 1861; lieutenant colonel, May 9, 1861; and colonel Second Cavalry, November 12, 1861.

On the 11th day of October, 1861, he was commissioned brigadier-general of volunteers, and major-general, January 27, 1865. He
2 was honorably mustered out of the volunteer service September 1, 1866. He received the following brevet appointments, viz:

First lieutenant, February 23, 1847, "for gallant and meritorious conduct in the battles of Beuna Vista."

Brigadier-General United States Army, March 13, 1865, "for gallant and meritorious services in the battle of Chickamauga, Georgia."

Major-General United States Army, March 13, 1865, "for gallant and meritorious services in the battle of Nashville, Tennessee."

Prior to the breaking out of the rebellion he served principally in Texas, Mexico, and Kansas. April 20, 1861, he was assigned to mustering and disbursing duty at Indianapolis, Indiana, where he remained until October of that year, when he joined the Army of the Cumberland as a brigadier-general of volunteers, and was assigned the command of a division. He was actively engaged in the field in the Southwest until wounded at the battle of Stone River, Tennessee, Decemcer 31, 1862 (being in command of a division at the time), and was absent on account of wounds until February 10, 1863.

On the 21st day of February, 1863, he was assigned to the command of the Twenty-first Army Corps. April 10, 1863, he was relieved and granted leave of absence to May 20, 1863, at which date he rejoined his command, serving in the field in command of the Third Division of the Fourth Army Corps until the close of the war. He was again wounded at the battle of Lovejoy Station, Georgia, September 2, 1864 (while in command of a division).

At the close of the war he was assigned to the command of the District of Mississippi, which he exercised until December, 1866. He subse-

quently served with his regiment in the Department of the Platte until ordered before a retiring board at New York city in February, 1868.

The retiring board having reported your petitioner incapacitated
3 for active service, by reason of wounds received in battle while commanding a division (the appropriate command of a major-general), he was appointed a major-general on the retired list of the Army by the President alone on the 9th day of June, 1868, under the following provision of law:

"SEC. 32. That officers of the regular army entitled to be retired on account of disability occasioned by wounds received in battle may be retired upon the full rank of the command held by them, whether in the regular or volunteer service, at the time such wounds were received." (Act of July 28, 1866, 14 Stats., p. 337.)

Your petitioner accepted this appointment, and his name was borne on the army register as a major-general on the retired list from June 9, 1868, to March 3, 1875, during which time he received the pay of a major-general retired.

On the 3d day of March, 1875, the President approved the following act of Congress, viz:

"SEC. 2. That all officers of the Army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list, placed upon it on account of wounds received in action: Provided, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement, nor to those retired officers who had lost an arm or leg or has an arm or leg permanently disabled by reason of resection on account of wounds, or both eyes by reason of wounds received in battle; and every such officer now borne on the retired list shall be continued thereon, notwithstanding the provisions of section two, chapter thirty-eight, act March thirty, eighteen hundred and sixty-eight: And be it also provided, That no retired officer shall be affected by this act who has been retired or may
hereafter be retired on the rank held by him at the time of his
4 retirement, and that all acts or parts of acts inconsistent herewith be, and are hereby, repealed." (18 Stats., p. 512.)

On the 23d day of March, 1875, the Secretary of War issued the following order, viz:

[General Orders No. 33.]

"WAR DEPARTMENT,
"ADJUTANT-GENERAL'S OFFICE,
"*Washington, D. C., March* 23, 1875.

"By direction of the President, and conformably to the act approved March 3, 1875, entitled "An act for the relief General Samuel W. Crawford, and to fix the rank and pay of retired officers of the Army," the retired list of the Army, under the heading "Officers retired with the full rank of the command held by them when wounded, in conformity with sections 16 and 17 of the act of August 3, 1861, and section 32 of the

act of July 28, 1866," is amended to fix the rank of the following-named officers from March 3, 1875, as below enumerated:

"Brigadier-Generals. Thos. J. Wood (heretofore Major-General).

* * * * * * * *

"By order of the Secretary of War:

"E. D. TOWNSEND,
"*Adjutant-General.*"

The act of March 3, 1875, did not confer upon the President alone the power to appoint your petitioner to a new office on the retired list of the Army, and the order of the Secretary of War of March 23 did not appoint your petitioner to the new office of brigadier-general on the retired list.

The defendant has withheld from your petitioner the difference between the pay of a major-general and a brigadier-general on the retired list of the Army, amounting to $1,500 per year, since March 3, 1875, a period of four years and six months, amounting in the aggregate, to September 3, 1879, to the sum of $6,750.

There has been no action on this claim by Congress or any department of the government, except a demand on the Paymaster-General of the Army for the same, who refused payment.

There has been no transfer or assignment of this claim, or of any part thereof or interest therein; and your petitioner is the sole owner of the same, and is justly entitled, as he believes, to the sum of $6,750.

5 Your petitioner has at all times borne true allegiance to the Government of the United States, and has not at any time or in any way aided, abetted, or given encouragement to rebellion against the United States.

Your petitioner demands judgment against the United States for the sum of $6,750.

THOMAS J. WOOD.

Claimant's post-office address is Dayton, Ohio.

Claimant's attorneys are Grafton & Ladd, No. 412 Fifth street, Washington, D. C.

STATE OF OHIO,
County of Montgomery, ss:

Thomas J. Wood, having been duly sworn on his said oath, says: I am the identical Thomas J. Wood named in the foregoing petition; as to the facts therein stated on my own knowledge, they are true; as to those stated on information and belief, I believe them to be true.

THOMAS J. WOOD.

Sworn to and subscribed by said Thomas J. Wood, before me, this 6th day of September, 1879.

[SEAL.]

ALBERT KERN,
Notary Public, Montgomery County, Ohio.

6 II. *Traverse.—Filed Sept.* 15, 1879.

And now comes the Attorney-General on behalf of the United States, and answering the petition of the claimant herein, denies each and every

allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Asst. Att'y-General.

7 III. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant was graduated from the United States Military Academy, and appointed a brevet second lieutenant in the Corps of Topographical Engineers, July 1, 1845; transferred to the Second Dragoons, October 19, 1846; promoted second lieutenant Second Dragoons, December 2, 1846; brevetted first lieutenant, February 23, 1847; first lieutenant, June 30, 1851; appointed captain First Cavalry, March 3, 1855; promoted major, March 16, 1861; lieutenant-colonel, May 9, 1861; promoted colonel Second Cavalry, November 12, 1861. He was commissioned brigadier-general of volunteers, October 11, 1861, and major-general of volunteers, January 27, 1865; and March 13, 1865, was brevetted brigadier-general and major-general United States Army. He was mustered out of the volunteer service September 1, 1866. He was on leave from date of graduation until he joined the Army in Texas, in September, 1845, where he served with the Corps of Topographical Engineers until October 25, 1845. He was then on sick leave of absence until April 9, 1846, when he rejoined the Corps of Topographical Engineers in Texas, subsequently serving with it in Mexico to December, 1846, when he joined the Second Dragoons. He served with his regiment, and was on detached service in Mexico to June, 1848, and subsequently in Louisiana and Texas, to October 16, 1849; was on special duty at West Point, N. Y., to January 2, 1850; on duty with his regiment or on staff duty in the Southwest to July 1, 1854; on recruiting service to September 15, 1855; with regiment in Kansas to November 23, 1857; on leave of absence to May 7, 1858; with regiment in Kansas and the Indian Territory to December 1, 1859; on leave to April 15, 1861; on mustering and disbursing duty to October 11, 1861, when he was relieved, having been commissioned brigadier-general of volunteers and assigned to the command of a brigade in the Department of the Cumberland; remained in command to December 24, 1861, when he was placed in command of camp of instruction at Bardstown, Ky., and was engaged in organizing a division, which he was to command, to January, 1862; commanding sixth division, Army of the Ohio, subsequently known as the first division, left wing, Fourteenth Army Corps, until December 31, 1862, when, at the battle of Stone River, he was wounded in the left foot by a rifle ball. He was absent on account of his wound until February 10, 1863; rejoined for duty and was in command of first division, Twenty-first Army Corps, to February 18, 1863; the Twenty-first Army Corps to some time in March, 1863, the first divis-

ion of that corps to April 10, 1863. He was on sick leave of absence to May 15, 1863; was commanding United States forces at Nashville, Tenn., to May 20, 1863; first division, Twenty-first Army Corps, to October, 1863, when the designation of the command was changed to the third division, Fourth Army Corps. Save during a sick leave of absence, from January 10 to February 12, 1864, he was present in the field, in command of that division, until December 1, 1864, having in the mean time been severely wounded, September 2, 1864, at the battle of Lovejoy's Station, Ga. He commanded the Fourth Army Corps to February 5, 1865; the third division, Fourth Corps, to August, 1865; the central district of Arkansas from September 9 to November 3, 1865; the Department of Mississippi from November 14, 1865, to September 1, 1866, and the district of Mississippi to January 17, 1867. He was on leave of absence and awaiting orders to December 10, 1867, and was commanding his regiment and Fort McPherson, Nebraska, to January 25, 1868, when he was ordered, at his own request, to appear before a retiring board in New York City.

8 II. The following is an extract of the proceedings of the retiring board in claimant's case, viz:

"ROOMS OF ARMY RETIRING BOARD,
"125 BLEECKER STREET, NEW YORK CITY,
"*February* 22, 1868—11 o'clock a. m.

"The board met pursuant to the forgoing orders.

* * * * * * *

"The board is of the opinion that Brevet Major-General Thomas J. Wood, col. 2d U. S. Cavalry, is incapacitated for active service, and that said incapacity is the result of three wounds received in battle in the line of his duty, while commanding a division of troops in the service of the United States.

"P. ST. GEO. COOKE,
"*Brig. Gen., U. S. A., Pres't Board, B. M. G.*

"JOHN J. HAWES,
"1*st Lieut.* 1*st Art'y, Recorder.*"

III. The proceedings of the retiring board in claimant's case were approved by the President, and thereupon, by his authority and direction, the following order was issued and published:

"[Special orders No. 136.]

"HEADQUARTERS OF THE ARMY,
"ADJUTANT-GENERAL'S OFFICE,
"WASHINGTON, *June* 9, 1868.

* * * * * * *

"9. Brevet Major-General Thomas J. Wood, colonel 2d U. S. Cavalry, having, at his own request, been ordered before a board of examination, and having been found by the board to be physically incompetent to discharge the duties of his office on account of wounds received in battle, and

the finding having been approved by the President, his name will be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or some injury incident thereto. In accordance with section 32 of the act approved July 28, 1866, General Wood is, by the direction of the President, retired with the full rank of major-general.

* * * * * * *

"By command of General Grant.

"E. D. TOWNSEND,
"*Assistant Adjutant-General.*"

The disability on account of which the claimant was retired was occasioned by the wounds received in battle by him when holding the command of a major-general.

IV. The claimant accepted the rank of major-general on the retired list, as contained in the order dated June 9, 1868, and received the pay of that rank from June 10, 1868, to March 3, 1875.

V. That on the 23d day of March, 1875, the Secretary of War published the following order, viz:

"[General Orders No. 33.]

"WAR DEPARTMENT,
"ADJUTANT-GENERAL'S OFFICE,
"WASHINGTON, *March* 23, 1875.

"By direction of the President, and conformably to the act approved March 3, 1875, entitled 'An act for the relief of General Samuel W. Crawford, and to fix the rank and pay of retired officers of the Army,' the retired list of the Army under the heading 'Officers retired with the full rank of the command held by them when wounded, in conformity with sections 16 and 17 of the act of August 3, 1861, and section 32 of the act of July 28, 1866,' is amended to fix the rank of the following-named officers, from March 3, 1875, as below enumerated:

* * * * *

"BRIGADIER-GENERALS.

"Thomas J. Wood (heretofore major-general).
"Richard W. Johnson (heretofore major-general).
"Eli Long (heretofore major-general).

"COLONELS.

"Joseph B. Kiddo (heretofore brigadier-general).
"William F. Lynch (heretofore brigadier-general).
"Samuel Ross (heretofore brigadier-general).

"LIEUTENANT-COLONELS.

"George W. Gile (heretofore colonel).
"John Pulford (heretofore colonel).

"MAJOR.

"Henry W. Freedley (heretofore colonel).

9 "CAPTAIN (MOUNTED).

"Thomas E. Maley (heretofore lieutenant-colonel).

"CAPTAINS.

"Theodore Yates (heretofore colonel).
"Albert W. Preston (heretofore colonel).

"FIRST LIEUTENANTS (MOUNTED).

"Paul Quirk (heretofore captain, mounted).
"David H. Cortelyou (heretofore captain, mounted).

"FIRST LIEUTENANTS.

"Robert Davis (heretofore captain).
"Henry H. Kuhn (heretofore captain).
"James B. Sinclair (heretofore captain).
"Edward B. Knox (heretofore first lieutenant, mounted).

"SECOND LIEUTENANT.

"James Davison (heretofore second lieutenant, mounted).

"By order of the Secretary of War.

"E. D. TOWNSEND,
"*Adjutant-General.*"

VI. Seventy-three officers were retired on the rank of the command held by them when wounded under section 32 of the act of July 28, 1866. (14 Stat. L., 337.) Of these, all fell within the exceptions named in section 2 of the act of March 3, 1875 (18 Stat. L., 512), but nineteen. Eight of these nineteen have been restored to the rank on which they were originally retired since the promulgation of the order set out in the fifth finding.

VII. Since March 3, 1875, claimant has only received the pay of a brigadier-general retired.

The pay of a major-general retired since March 3, 1875, has been $5,625 per year, and that of a brigadier-general retired, $4,125 per year.

From June 9, 1868, to March 23, 1875, the claimant's name was on the Army Register with the rank of major-general retired, and since that time his name has been on the register with the rank of brigadier-general retired.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is not entitled to recover, and that his petition must be dismissed.

RICHARDSON, J., delivered the opinion of the court:

The claimant alleges, in effect, that he held and still holds the office of major-general on the retired list of the Army, and that Congress has undertaken, by legislative enactment, to remove him from that office and to appoint him to the office of brigadier-general on the retired list. This, he contends, they have no constitutional power to do, and he seeks to recover the difference between the salary of a major-general and that of a brigadier-general, which last has been paid to him.

He held the office of colonel of cavalry in the line of the Army of the United States on the active list, when Congress passed the act of July 28, 1866, chap. 299, (14 Stat. L., 337), the thirty-second section of which was as follows:

"SEC. 32. That officers of the regular army entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command held by them, whether in the regular or volunteer service at the time such wounds were received."

The claimant was wounded in battle while in command of a division of the Army, that being the command of an officer of the rank of major-general. In the year 1868 he was ordered before a retiring board of officers, in accordance with the provisions of law which now form sections 1245–1251 of the Revised Statutes. On the 24th of February of that year the retiring board made the following report, which was approved by the President:

"The board is of the opinion that Brevet Maj. Gen. Thomas J. Wood, colonel Second United States Cavalry, is incapacitated for active service, and that said incapacity is the result of three wounds received in battle in the line of his duty while commanding a division of troops in the service of the United States."

In pursuance of the provisions of the act of 1866 already cited, and this report of the retiring board, the claimant was retired by direction of the President on the 9th of June, 1868, with the full rank of major-general.

In order to a correct decision of the issue involved in this case we must first consider what is the difference between office and rank, and must then determine what office the claimant held when thus retired.

The titles or names of the offices to which general and line officers of the Army are appointed—general, lieutenant-general, major-general, brigadier-general, colonel of cavalry or infantry, lieutenant-colonel, major, captain, and lieutenant—are employed also as the designation of rank for both the line and the staff, and when no other rank is conferred upon general and line officers the titles of their respective offices also express their rank. But it does not follow that rank and office are therefore always identical, and in point of fact they are not so.

Rank is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments. This is the case with the staff officers of the Army. Section 1131 of the Revised Statutes pro-

vides that there shall be five inspectors-general, with the rank of colonel of cavalry. The office thus provided for is inspector-general, and not colonel of cavalry. The latter is a designation with entirely different legal effect from that which the same words express when used to describe an office—that is to say, he receives the pay and is entitled to the dignity, but has not the office, with its command and other duties, of a colonel of cavalry. In the same manner the Judge-Advocate General has the rank of brigadier-general (Rev. Stat., § 1198), and chaplains have the rank of captains of infantry (Rev. Stat., § 1122). The Adjutant-General has the rank of brigadier-general, and the assistant adjutant-generals the rank of colonel, lieutenant-colonel, or major of cavalry (Rev. Stat., § 1128). So with officers of the Quartermaster's Department and the Medical Department, who have rank attached to, but separate and distinct from, their office (Rev. Stat., §§ 1132, 1168).

The distinction between rank and office is thus more clearly apparent with reference to staff officers than to officers of the line, because in the latter case the words used to designate the rank and the office are usually the same, while in the former case they are always different.

In some cases officers of the line have a rank assigned to them different from that of the title of their office. The Revised Statutes, in section 1096, provide that the General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry. By
11 section 1097, the Lieutenant-General may select from the Army two aids and one military secretary, who shall have the rank of lieutenant-colonel of cavalry while serving on his staff. These selections may be, and usually are, made from among officers whose rank is raised to a higher degree by the service assigned to them. A captain of infantry in the line of the Army may thus be made to rank, temporarily, as a colonel of cavalry. That the new rank thus conferred is not a new office is conclusively shown by the fact that it is required by a selection or appointment, if it may be so called, made by the General of the Army, and the Constitution does not permit the power of appointment to office to be vested in the General of the Army (United States v. Germaine, 99 U. S. R., 503; Collins' case, 14 C. Cl. S. R,, 568).

The pay of officers on the retired list of the Army is determined by the rank upon which they are retired (Rev. Stat., § 1274), and all officers whether on the active or retired list, are paid according to their rank, except in the case of chaplains, who, under the designation or title of their office, are paid a lower rate than is allowed to other officers of the same rank (Rev. Stat., § 1261).

By the laws governing the Navy, unlike those respecting the Army, the pay of staff officers is fixed generally according to and by the designation or title of the offices held by them, and does not depend upon their rank; so that the rank of staff officers of the Navy is usually operative only in determining the relation of the different officers in the service to each other in matters of precedence, privileges, and the like, and is generally called relative rank (Rev. Stat., §§ 1471–1488, 1556).

Grade is a step or degree in either office or rank, and has reference to the divisions of the one or the other or both, according to the connection in which the word is employed.

Thus section 1129 of the Revised Statutes provides that all vacancies in the grade of major, in the Adjutant-General's Department, shall, when filled, be filled by selection from captains of the Army. In that department the grade of major is the rank of the thirteen assistant adjutant-generals of the lowest rank, and therefore grade there refers to rank. Section 1168 provides that all original vacancies in the grade of assistant surgeons shall be filled by selection, by examination, from among the persons who have served as staff or regimental surgeons of volunteers in the Army of the United States during the late war, and in that section grade refers to office, as no rank is mentioned.

By Revised Statutes, section 1094, officers on the retired list of the Army compose part of the Army of the United States, and therefore no one can be upon that list who is not an officer appointed as required by the Constitution, Art. 2, § 2. But being such officer thus appointed, of any grade on the active list, he may be retired with a rank higher or lower than that which belongs to his office whenever Congress sees fit so to provide. Congress cannot appoint him to a new and different office, because the Constitution vests the appointing power in the President with the advice of the Senate, or in certain cases in the President alone, the heads of the executive departments, or the courts of law; but Congress may transfer him to the retired list, and may change his rank and pay at any time without coming in conflict with that provision of the Constitution.

12 Congress has frequently exercised the power of changing the mere rank of officers without invoking the constitutional power of the executive to appoint the incumbents to new offices. But when it has been the purpose to place on the retired list one who has been discharged from service, who no longer holds an office in the Army, Congress has provided for his restoration or reappointment in the manner pointed out by the Constitution, generally by the President alone, and then has authorized his retirement. Such was the case of Major Collins (14 C. Cls. R., 568). In some cases Congress has provided for the appointment, in the constitutional manner, of an officer upon his retirement, to a higher grade of office than that which he held on the active list. (Act of June 26, 1876, chap. 114, 19 Stat. L., 60.)

In the present case, the claimant being a colonel in the line of the Army, his retirement with the rank of major-general, under the act authorizing it, did not confer upon him a new office, and, therefore, did not make him a major-general. He remained a colonel of cavalry, to which office he had been duly appointed, and he acquired only new and higher rank by the act of Congress authorizing his retirement. It was within the legislative power of Congress, under the Constitution, to change his rank at any time, and this they did by the act of March 3, 1875, chap. 178, § 2 (18 Stat. at L., 512), wherein it is provided that "all officers of the Army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay thereafter accordingly." This reduced the rank of the claimant on the retired list from that of major-general to that of brigadier-general, which was the rank held by him in the volunteer service at the time his wound was received, but left him still in the office of colonel of cavalry.

The order of the War Department of March 23, 1875, which styles the claimant "brigadier-general," "formerly major-general," refers, by those designations, only to his rank and not to his office. His rank was all the order was dealing with, and it had no reference to official appointment.

It is alleged on the part of the claimant, as before stated, that Congress undertook to remove him from the office of major-general and to appoint him to the office of brigadier-general, which they have no constitutional power to do, and it is claimed that he is still a major-general, and entitled to be paid as such. But we have shown that the claimant was not appointed to the office of major-general; that he still retained, on the retired list, the office of colonel of cavalry; that the rank which was conferred upon him by act of Congress upon his retirement was in no sense a constitutional appointment to a new office; and that the same power which gave him that rank could take it away. His rank having been reduced from that of major-general to that of brigadier-general, his retired pay, which is controlled by rank, is reduced accordingly. As he has already been paid the salary of his rank his petition must be dismissed.

13 V. *Final Judgment.*

At a Court of Claims held in the city of Washington on the eighth of March. A. D. 1880, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimant, the said Thomas J. Wood, be dismissed.

14 VI. *Application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 8th day of March, 1880, in favor of the defendants, the claimant, by his attorneys, Grafton & Ladd, on the 10th day of May, 1880, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

GRAFTON AND LADD,
Att'ys for Claimant.

Filed May 10, 1880.

And now, to wit, May 10, 1880, it is ordered that the appeal be allowed as prayed for.

15 In the Court of Claims.

THOMAS J. WOOD
vs.
THE UNITED STATES. } No. 12074.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for the allowance of an appeal

to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 14th day of June, A. D. 1880.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

(Indorsement on cover:) No. 231. Thomas J. Wood, appellant, vs. The United States. Court of Claims. Filed 18 June, 1880.

17-414

OFFICE SUPREME COURT U.S.
FILED
MAR 29 1883
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 231.

THOMAS J. WOOD, Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

HALBERT E. PAINE,
Counsel for Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1882.

THOMAS J. WOOD, Appellant,
vs.
THE UNITED STATES.

No. 231.

APPELLANT'S BRIEF.

STATEMENT.

The appellant's petition contained the following averments:

On the 1st day of July, 1845, your petitioner graduated from the United States military academy, and was appointed a second lieutenant by brevet in the corps of topographical engineers; transferred to second dragoons October 9, 1846; promoted second lieutenant, December 2, 1846; first lieutenant, June 30, 1851; captain first cavalry, March 3, 1855; major, March 16, 1861; lieutenant-colonel, May 9, 1861; and colonel second cavalry, November 12, 1861.

On the 11th day of October, 1861, he was commissioned brigadier-general of volunteers, and major-general, January 27, 1865. He was honorably mustered out of the volunteer service September 1, 1866.

* * * * * * * * *

At the close of the war he was assigned to the command of the district of Mississippi, which he exercised until December, 1866. He subsequently served with his regiment in the department of the Platte until ordered before a retiring board at New York city in February, 1868.

The retiring board having reported your petitioner incapacitated for active service, by reason of wounds received in battle while commanding a division, (the appropriate *command* of a major-general,) he was appointed a major-general on the retired list of the army by the president alone on the 9th day of June, 1868, under the following provision of law:

"SEC. 32. That officers of the regular army entitled to be retired on account of disability occasioned by wounds received in battle may be retired upon the full rank of the command held by them, whether in the regular or volunteer service, at the time such wounds were received." (Act of July 28, 1866, 14 Stats., p. 337.)

Your petitioner accepted this appointment, and his name was borne on the army register as a major-general on the retired list from June 9, 1868, to March 3, 1875, during which time he received the pay of a major-general retired.

On the 3d day of March, 1875, the president approved the following act of Congress, viz.:

"SEC. 2. That all officers of the army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list, placed upon it on account of wounds received in action: *Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement, nor to those retired officers who had lost an arm or leg, or had an arm or leg permanently disabled by reason of resection on account of wounds, or both eyes by reason of wounds received in battle; and every such officer now borne on the retired list shall be continued thereon, notwithstanding the provisions of section two, chapter thirty-eight, act of March thirty, eighteen hundred and sixty-eight: *And be it also provided*, That no retired officer shall be affected by this act who has been retired or may hereafter be retired on the rank held by him at the time of his retirement, and that all acts or parts of acts inconsistent herewith be, and are hereby, repealed." (18 Stats., p. 512.)

On the 23d day of March, 1875, the secretary of war issued the following order, viz.:

"GENERAL ORDERS } WAR DEPARTMENT,
No. 33. } ADJUTANT-GENERAL'S OFFICE.
WASHINGTON, D. C., *March* 23, 1875.

By direction of the president, and conformably to the act approved March 3, 1875, entitled 'An act for the relief of General *Samuel W. Crawford*, and to fix the rank and pay of retired officers of the army,' the retired list of the army under the heading 'Officers retired with the full rank of the command held by them when wounded, in conformity with sections 16 and 17 of the act of August 3, 1861, and section 32 of the act of July 28, 1866,' is amended to fix the rank of the following-named officers from March 3, 1875, as below enumerated: BRIGADIER-GENERALS, *Thos. J. Wood*, (heretofore major-general.)

* * * * * * * *

"By order of the secretary of war:

"E. D. TOWNSEND, *Adjutant-General*."

The act of March 3, 1875, did not confer upon the president alone the power to appoint your petitioner to a new office on the retired list of the army, and the order of the secretary of war of March 23 did not appoint your petitioner to the new office of brigadier-general on the retired list.

The defendant has withheld from your petitioner the difference between the pay of a major-general and a brigadier-general on the retired list of the army, amounting to $1,500 per year, since March 3, 1875, a period of four years and six months, amounting in the aggregate, to September 3, 1879, to the sum of $6,750.

There has been no action on this claim by congress or any department of the government, except a demand on the paymaster-general of the army for the same, who refused payment.

There has been no transfer or assignment of this claim, or of any part thereof or interest therein; and your petitioner is the sole owner of the same, and is justly entitled, as he believes, to the sum of $6,750.

Your petitioner has at all times borne true allegiance to the government of the United States, and has not at any time or in any way aided, abetted, or given encouragement to rebellion against the United States.

Your petitioner demands judgment against the United States for the sum of $6,750.

FINDINGS OF FACT.

This case having been heard before the court of claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant was graduated from the United States military academy and appointed a brevet second lieutenant in the corps of topographical engineers July 1, 1845; transferred to the second dragoons October 19, 1861; promoted second lieutenant second dragoons December 2, 1846 (brevetted first lieutenant February 23, 1847); first lieutenant June 30, 1851; appointed captain first cavalry March 3, 1855; promoted major March 16, 1861; lieutenant-colonel May 9, 1861; promoted colonel second cavalry November 12, 1861. He was commissioned brigadier-general of volunteers October 11, 1861, and major-general of volunteers January 27, 1865; and March 13, 1865, was brevetted brigadier-general and major-general United States army. He was mustered out of the volunteer service September 1, 1866. He was on leave from date of graduation until he joined the army in Texas, in September, 1845, where he served with the corps of topographical engineers until October 25, 1845. He was then on sick leave of absence until April 9, 1846, when he rejoined the corps of topographical engineers in Texas, subsequently serving with it in Mexico to December, 1846, when he joined the second dragoons. He served with his regiment and was on detached service in Mexico to June, 1848, and subsequently in Louisiana and Texas to October 16, 1849; was on special duty at West Point, N. Y., to January 2, 1850; on duty with his regiment or on staff duty in the southwest to July 1, 1854; on recruiting service to September 15, 1855; with regiment in Kansas to November 23, 1857; on leave of absence to May 7, 1858; with regiment in Kansas and the Indian Territory to December 1, 1859; on leave to April 15, 1861; on mustering and disbursing duty to October 11, 1861, when he was relieved, having been commissioned brigadier-general of volunteers and assigned to the command of a brigade in the department of the Cumberland; remained in command to December 24, 1861, when he was placed in command of a camp of instruction at Bardstown, Ky., and was engaged in organizing a division, which he was to command, to January, 1862; commanding sixth division, army of the Ohio, subsequently known as the first division, left wing, fourteenth army corps, until December 31, 1862, when, at the battle of Stone River, he was wounded in the left foot by a rifle-ball. He was absent on account of his wound until February 10, 1863; rejoined for duty and was in command of first division, twenty-first army corps, to February 18, 1863; the twenty-first army corps to

some time in March, 1863; the first division of that corps to April 10, 1863. He was on sick leave of absence to May 15, 1863; was commanding United States forces at Nashville, Tenn., to May 20, 1863; first division, twenty-first army corps, to October, 1863, when the designation of the command was changed to the third division, fourth army corps. Save during a sick leave of absence, from January 10 to February 12, 1864, he was present in the field, in command of that division, until December 1, 1864, having in the meantime been severely wounded September 2, 1864, at the battle of Lovejoy's Station, Ga. He commanded the fourth army corps to February 5, 1865; the third division, fourth corps, to August, 1865; the central district of Arkansas from September 9 to November 3, 1865; the department of Mississippi from November 14, 1865, to September 1, 1866, and the district of Mississippi to January 17, 1867. He was on leave of absence and awaiting orders to December 10, 1867, and was commanding his regiment and Fort McPherson, Nebraska, to January 25, 1868, when he was ordered, at his own request, to appear before a retiring board in New-York city.

II.

The following is an extract of the proceedings of the retiring board in claimant's case, viz:

"ROOMS OF ARMY RETIRING BOARD,
125 BLEECKER STREET, NEW YORK CITY,
February 22, 1868, 11 o'clock A. M.

The board met pursuant to the foregoing orders.

* * * * * * *

The board is of the opinion that Brevet Major-General Thomas J. Wood, colonel 2d U. S. cavalry, is incapacitated for active service, and that said incapacity is the result of three wounds received in battle in the line of his duty while commanding a division of troops in the service of the United States.

P. ST. GEO. COOKE,
Brig. Gen. U. S. A., Pres't B. M. G.

JOHN H. HAWES,
1st Lieut. 1st Art'y, Recorder."

III.

The proceedings of the retiring board in claimant's case were approved by the President, and thereupon by his authority and direction the following order was issued and published:

"SPECIAL ORDERS } HEADQUARTERS OF THE ARMY,
No. 136. } ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, June 9, 1868.

* * * * * * *

9. Brevet Major-General Thomas J. Wood, colonel 2d U. S. cavalry, having, at his own request, been ordered before a board of examination, and having been found by the board to be physically incompetent to discharge the duties of his office on account of wounds received in battle, and the finding having been approved by the president, his name will be placed upon the list of retired officers of that class in which the disability results from long and faithful service or some injury incident thereto. In accordance with section 22 of the act ap-

proved July 18, 1866, General Wood is, by the direction of the president, retired with the full rank of major-general.

* * * * * * *

By command of General Grant.

E. D. TOWNSEND,
Assistant Adjutant-General."

The disability on account of which the claimant was retired was occasioned by the wounds received in battle by him when holding the command of a major-general.

IV.

The claimant accepted the rank of major-general on the retired list as contained in the order dated June 9, 1868, and received the pay of that rank from June 10, 1868, to March 3, 1875.

V.

On the 23d day of March, 1875, the secretary of war published the following order, viz:

["General Orders No. 33.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, March 23, 1875.

By direction of the president, and conformably to the act approved March 3, 1875, entitled 'An act for the relief of General Samuel W. Crawford, and to fix the rank and pay of retired officers of the army,' the retired list of the army, under the heading 'Officers retired with the full rank of the command held by them when wounded, in conformity with sections 16 and 17 of the act of August 3, 1861, and section 32 of the act of July 28, 1866,' is amended to fix the rank of the following-named officers from March 3, 1875, as below enumerated:

* * * * * * * *

BRIGADIER-GENERALS.

Thomas J. Wood (heretofore major-general).
Richard W. Johnson (heretofore major-general).
Eli Long (heretofore major-general).

COLONELS.

Joseph B. Kiddo (heretofore brigadier-general).
William F. Lynch (heretofore brigadier-general).
Samuel Ross (heretofore brigadier-general).

LIEUTENANT-COLONELS.

George W. Gile (heretofore colonel).
John Pulford (heretofore colonel).

MAJOR.

Henry W. Freedly (heretofore colonel).

CAPTAIN (MOUNTED).

Thomas E. Maley (heretofore lieutenant-colonel).

CAPTAINS.

Theodore Yates (heretofore colonel).
Albert W. Preston (heretofore colonel).

FIRST LIEUTENANTS (MOUNTED).

Paul Quirk (heretofore captain, mounted).
David H. Cortelyou (heretofore captain, mounted).

FIRST LIEUTENANTS.

Robert Davis (heretofore captain).
Henry H. Kuhn (heretofore captain).
James B. Sinclair (heretofore captain).
Edward B. Knox (heretofore first lieutenant, mounted).

SECOND LIEUTENANT.

James Davison (heretofore second lieutenant, mounted).

By order of the secretary of war.

E. D. TOWNSEND.
Adjutant-General."

VI.

Seventy-three officers were retired on the rank of the command held by them when wounded under section 32 of the act of July 28, 1866, (14 Stat. L., 337.) Of these, all fell within the exceptions named in section 2 of the act of March 3, 1875, (18 Stat. L., 512,) but nineteen. Eight of these nineteen have been restored to the rank on which they were originally retired since the promulgation of the order set out in the fifth finding.

VII.

Since March 3, 1875, claimant has only received the pay of a brigadier-general retired.

The pay of a major-general retired since March 3, 1875, has been $5,625 per year, and that of a brigadier-general retired $4,125 per year.

From June 9, 1868, to March 23, 1875, the claimant's name was on the army register with the rank of major-general retired, and since that time his name has been on the register with the rank of brigadier-general retired.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is not entitled to recover, and that his petition must be dismissed.

ARGUMENT.

The following is the statutory provision of July 28, 1866, (14 Stat., 337,) which was in force when the appellant was retired:

SEC. 32. *And be it further enacted*, That officers of the regular army entitled to be retired on account of disability occasioned by wounds received in battle may be retired upon the full rank of the command held by them, whether in the regular or volunteer service, at the time such wounds were received.

The following are the provisions of the prior act of August 3, 1861:

SEC. 15. Any commissioned officer of the army, or of the marine corps, who shall have served as such for forty consecutive years, may, upon his own application to the president of the United States, be placed upon the retired list of officers, with the pay and emoluments allowed by this act.

SEC. 16. If any commissioned officer of the army, or of the marine corps, shall have become, or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list and withdrawn from active service and command, and from the line of promotion, with the following pay and emoluments, namely: The pay proper of the highest rank held by him, at the time of his retirement, whether by staff or regimental commission, and four rations per day, and without any other pay, emoluments, or allowances. 12 Stat., 289.

Afterwards it was enacted, on the 10th of June, 1872, that,

"Officers hereafter retired from active service shall be retired upon the actual rank held by them at the date of retirement."

The act of March 3, 1875, contains the following provision:

SEC. 2. That all officers of the army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list, placed upon it on account of wounds received in action: *Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement, nor to those retired officers who had lost an arm or a leg, or had an arm or leg permanently disabled by reason of resection on account of wounds, or both eyes, by reason of wounds received in battle.

The following are the material provisions of the revised statutes relating to retired officers:

SEC. 1094. The army of the United States shall consist of—

* * * * * * * *

Five regiments of artillery.
Ten regiments of cavalry.
Twenty-five regiments of infantry.

* * * * * * * *

The officers of the army on the retired list.
And the professors and corps of cadets of the United States military academy.

SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired.

SEC. 1243. When an officer has served forty consecutive years, as a commissioned officer, he shall, if he makes application therefor to the president, be retired from active service and placed upon the retired list.

SEC. 1244. When any officer has served forty-five years, as a commissioned officer, or is sixty-two years old, he may be retired from active service at the discretion of the president.

SEC. 1245. When any officer has become incapable of performing the duties of his office he shall be either retired from active service or wholly retired from the service by the president, as hereinafter provided.

SEC. 1251. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the president, said officer shall be retired from active service and placed on the list of retired officers.

SEC. 1255. Officers retired from active service shall be withdrawn from command and from the line of promotion.

SEC. 1257. When any officer in the line of promotion is retired from active service, the next officer in rank shall be promoted to his place, according to the established rules of the service; and the same rule of promotion shall be applied successively to the vacancies consequent upon such retirement.

SEC. 1258. The whole number of officers of the army on the retired list shall not at any time exceed three hundred; and any less number to be allowed thereon may be fixed by the president in his discretion.

SEC. 1259. Retired officers of the army may be assigned to duty, at the Soldiers' Home, upon a selection by the commissioners of that institution, approved by the secretary of war; and a retired officer shall not be assignable to any other duty.

SEC. 1260. Any retired officer may, on his own application, be detailed to serve as professor in any college.

I.

An office in the active service of the army is a position to which certain duties are made appropriate by law, which sustains certain relations to other offices in the army, constituting its grade and rank, and which has a particular title or name and a specified rate of compensation. The duties, grade, rank, title, and pay are integral parts of the office.

1. At the time when the appellant's cause of action accrued there were, in the active service of the army of the United States, ten grades of offices of the line, including those of the four general offices, viz.: 1. General; 2. Lieutenant-general; 3. Major-general; 4. Brigadier-general; 5. Colonel; 6. Lieutenant-colonel; 7. Major; 8. Captain; 9. First lieutenant; 10. Second lieutenant.

There were, at the same time, twenty-two generic offices of the line, viz.: 1. General; 2. Lieutenant-general;

3. Major-general; 4. Brigadier-general; 5. Colonel of artillery; 6. Colonel of cavalry; 7. Colonel of infantry; 8. Lieutenant-colonel of artillery; 9. Lieutenant-colonel of cavalry; 10. Lieutenant-colonel of infantry; 11. Major of artillery; 12. Major of cavalry; 13. Major of infantry; 14. Captain of artillery; 15. Captain of cavalry; 16. Captain of infantry; 17. First lieutenant of artillery; 18. First lieutenant of cavalry; 19. First lieutenant of infantry; 20. Second lieutenant of artillery; 21. Second lieutenant of cavalry; and 22. Second lieutenant of infantry.

Inasmuch as the artillery embraced five regiments and sixty batteries, the cavalry ten regiments and one hundred and twenty troops, and the infantry twenty-five regiments and two hundred and fifty companies, and each one of these regiments, batteries, troops, and companies had its own proper offices, in the respective grades, the actual number of specific offices of the line exceeded thirteen hundred.

2. The rank of these ten grades and twenty-two generic offices, with the exception of the general's, was fixed by articles 4 and 5 of the army regulations, which, by statutory enactment, were made a part of the law of the United States.

Articles 4 and 5 of the army regulations are in the following words:

4. Rank of officers and non-commissioned officers:

1st. Lieutenant-general.	10th. Cadet.
2d. Major-general.	11th. Sergeant-major.
3d. Brigadier-general.	12th. Quartermaster-sergeant of a regiment.
4th. Colonel.	
5th. Lieutenant-colonel.	13th. Ordnance-sergeant and hospital steward.
6th. Major.	
7th. Captain.	14th. First sergeant.
8th. First lieutenant.	15th. Sergeant.
9th. Second lieutenant.	16th. Corporal.

And in each grade by date of commission or appointment.

5. When commissions are of the same date, the rank is to be decided, between officers of the same regiment or corps, by the order of appointment; between officers of different regiments or corps: 1st. By rank in actual service when appointed. 2d. By former rank and service in the army or marine corps. 3d. By lottery among such as

have not been in the military service of the United States. In case of equality of rank by virtue of a brevet commission, reference is had to commission, not brevet.

The regulation of rank in the army is not an incidental effect of these two articles, but is the very purpose for which they were framed. If there could be found, in any statute framed for a different purpose, phraseology, adopted by legislators unfamiliar with military terms, apparently inconsistent with these regulations, it would not be effectual to modify them.

In the ten grades, therefore, of general, lieutenant-general, major-general, brigadier-general, colonel, lieutenant-colonel, major, captain, first lieutenant and second lieutenant, while there are twenty-two generic offices, there are only ten generic ranks. For the colonels of artillery, cavalry, and infantry have only one generic rank. The lieutenant-colonels of the three arms have only one generic rank. The same is true of the majors, captains and first and second lieutenants. But at the same time there are, of course, as many specific ranks as there are offices and officers. For although officers of the same grade hold the same generic rank, they at the same time hold, as between themselves, different specific ranks. Each officer of a particular grade differs in rank, not only from all officers in other grades, but also from all other officers in his own grade. In the six grades of colonel, lieutenant-colonel, major, captain, first lieutenant, and second lieutenant, of the line, there are eighteen offices,—six in the infantry, six in the cavalry, and six in the artillery. But there are not eighteen ranks. There are only six generic ranks.

The office of colonel of infantry is a distinct office. So is that of colonel of cavalry, and that of colonel of artillery. So is each one of the eighteen line offices from second lieutenant up to colonel, both included. But the title "colonel of infantry" does not designate the rank of any office. Nor does the title of either one of these

distinct line offices designate rank. It is the titles of the several grades that designate rank. These are simply colonel, lieutenant-colonel, major, captain, first lieutenant, and second lieutenant. The office of colonel of cavalry ranks neither higher nor lower than the offices of colonel of artillery and colonel of infantry. The rank of the colonels of these three arms, as amongst themselves, is determined, not by the arms to which they respectively belong, but by the dates of their commissions, or, when their commissions are of the same date, by order of appointment, or by rank in actual service when appointed, or by former rank and service, or by lottery. Of all the colonels in the three arms, he holds the highest rank who holds the oldest commission, and yet they all hold one generic rank, that is to say, the rank not of colonel of cavalry, nor of colonel of artillery, nor of colonel of infantry, but of *colonel*. A colonel of infantry, if his commission is older than that of any colonel of cavalry or artillery, holds a higher rank than any colonel of cavalry or artillery; and yet all of them hold the rank of colonel.

The captains of cavalry, infantry, and artillery do not constitute three distinct ranks. There is no such thing in the army as the rank of captain of artillery, or the rank of captain of infantry, or the rank of captain of cavalry. There is the rank of captain, which is the generic rank of all the captains of the three arms, and includes as many specific ranks as there are individual captains in all of the three arms of the service. With their differences in rank the difference of arm has nothing whatever to do. The captain of highest rank in the army may be of either arm. The second in rank may be of either arm. The same is true of the entire list of captains in the army, and of all the officers in the other grades.

There are certain officers in the army known as staff officers, whose duties differ from those of officers of the line. It is deemed convenient that these staff officers

should, for certain purposes, sustain, not only to each other, but also to the whole army, some of the relations which line officers sustain to each other. For example, it is deemed desirable to give to the office of adjutant-general, for certain purposes, the same relation to other officers in the army which the brigadier-general's office sustains. Several courses were open. A third title might have been chosen, which would characterize this relative position, both for the staff officer and for the officer of the line. Or the title of the line officer might be applied to the staff officer to fix the relation of his position to others in the army. The latter course has been adopted. In all cases the relations which staff officers sustain to each other and to other officers in the army, for certain purposes, are indicated by the application of titles of line officers.

3. The duties, grade, rank, title, and pay are all parts of that which is conferred upon the officer by his appointment, parts of that which he takes and holds by virtue of his appointment. The appointment of a colonel of the line confers upon the appointee the office of colonel, *including* its duties, grade, rank, pay, and title,—not the office of colonel, *excluding* either its duties, grade, rank, pay, or title. A colonel of the line, who is not a colonel, but only a lieutenant-colonel, in duties, grade, rank, title, or pay, is a stranger to the laws of the United States. Equally unknown to our laws is the colonel of the line who is, in duties, grade, rank, pay, or title, not a colonel, but a brigadier-general.

The captain of the line, with the brevet rank of colonel, has a well-known place in our system. The law permits an officer to hold, at the same time, one office in the line of our army and the brevet rank of another line office. A captain of the line may hold the brevet rank of colonel. The president confers such brevet rank by and with the advice and consent of the senate. It is not a mere

voucher for pay, a mere nominal, unsubstantial rank, conferred in a mode unknown to the constitution, by the selection of a general; but it is substantial rank, which, being conferred by appointment in accordance with the constitution, becomes a charter for precedence and command in the spheres of duty indicated in the law. But for conferring upon an officer one office in the line of the army and the lineal rank of another, no law nor reason can be found. The law knows no officer who holds one line office, without holding its rank, and, at the same time, holds the lineal rank of another line office, without holding the office itself; who is a lieutenant-colonel of the line without the rank of the office, and is, at the same time, a colonel in lineal rank, without holding the office to which such rank belongs.

There is an office of captain of cavalry. This office has the grade and generic rank of captain. The office of captain of artillery has the same grade and generic rank. Certain duties are prescribed by law and regulations for the office of captain of cavalry. Different duties are prescribed for the office of captain of artillery. A certain rate of pay is fixed by law for the office of captain of cavalry. The same rate of pay is fixed for the office of captain of artillery. Again, the titles of these two offices, though similar, are not identical. One office, therefore, may have the same rank and grade which another has, and the same pay, and yet have different duties and a different title. It is the rank, grade, pay, duties, and title together that constitute the office. The office is not an abstraction, to which the duties, pay, title, grade, and rank are attached, as mere extraneous appendages. It is a concrete thing, and it embraces, not as appendages, but as *integral parts*, the duties, grade, rank, pay, and title, and any other elements which the legislature may incorporate into the "sum and substance" of the office.

DISCREPANCY IN PAGINATION

Or

PAGES MISSING

And

CANNOT BE FOUND

may apply, to wit: that a party may be estopped from retaining property and at the same time setting up invalidity in the obligations given for it—then we submit our mortgage may be effectual for us on the facts, notwithstanding the theory of the pleadings. In that view all the considerations urged as to the continuance for us of twenty-one years under the statutes in force in 1859 when the mortgage was given, and as to the incapacity of C. A. Ely, and the minorship of W. A. Ely, would be applicable. The barring of notes does not bar a mortgage. 11 O. St. R., 42.

If, on the other hand, the mortgage is to be disregarded as not valid for any purpose, either of enforcement or of estoppel on the purchaser from claiming to hold a purchase while repudiating as void the obligations given for it, then the contract was entered into under mutual mistake not discovered until within ten years of the filing of this bill. It was a substantial mistake. It substituted for mortgage security the credit of a county whose warrants were not then worth fifty cents on the dollar. And the warrants Chapman took were not paid for ten years, and then they were not paid, but bonded. Rec., pp. 59–60.

The Vendor's Lien. This has been fully presented by us and we leave it to the Court on the discussion already had and the authorities collated on either side. Incidentally, however, to suggestions made by appellee, we ought to notice, perhaps, that even if the taking of a mortgage on the whole property could be taken as a waiver of this lien (which is contrary to the authorities), certainly the taking by mutual mistake of an invalid mortgage could not be a permanent waiver. Nor could a knowledge of the statute as to how the County was to raise

funds and pay, be made to operate as a waiver of a lien by which he could be secure against the derelictions of an insolvent purchaser.

Finally, we do not consider the above suggestions as essential to be presented, but as proper to be presented. We cannot but believe that the propositions of our opening argument are ample, and well sustained by the authorities for the relief we ask.

This Honorable Court, possessed of the whole case, will surely find in some of the ways suggested by counsel, or if not in them, then in some principle of equity which their own greater learning and experience may bring forward and apply, some method by which the complainants may have what is justly due them, and the defendant be enabled to avoid the stigma of never paying what it justly owes.

Respectfully submitted,

GEORGE WILLEY,

C. C. BONNEY,

Counsel for Appellants.

ADDENDUM.

We have lately noticed a case in 1 Nebraska, 382, which so fortifies some of the suggestions of the above reply brief already printed, that, with permission, we would add here a short restatement, in connection with this authority, of the two general alternative views of our reply; to wit: of rescission of contract with reconveyance, and affirmation with enforcement.

FIRST.

The contract of March 4, 1859, provided for deferred payments and a mortgage.

March 5, a deed was made, and mortgage given, with notes. But the notes and mortgage were void.

Hence, there being mutual mistake, Chapman had a right instantly to demand a reconveyance, and without tendering back the County warrants received as the down payment, for these being drawn on the Treasurer, and accepted by him, without funds, simply constituted a contract of indebtedness which the reconveyance itself would have cancelled.

This cause of action accrued to Chapman March 5, 1859.

It was under limitation of twenty-one years.

The statute of July, 1869, fixed ten years.

But ten years had already expired March 5, 1869.

The statute did not in terms embrace past causes of action.

If it did, it could not be applied so as to destroy causes of action then existing. They would be entitled to ten years after the act, or at least to a reasonable time. Under the facts as shown of attempted enforcement, and the negotiations had, July, 1877, when this bill was filed, would be in reasonable time.

Again, this cause, or right of action, was unknown till 1868 or 1871. If at 1868, then ten years would be allowed, and this bill was filed in 1877.

Besides, this discovery was made when Wm. A. Ely was of non-age, and he was still a minor, and, therefore, within the saving clause when this action was commenced.

No doubt, the County having entered and made valuable improvements, equity would relieve against rescission on terms; that is, that the County should pay what was due.

SECOND.

Of course, there was mutual mistake as to the power of the County to make a mortgage, as contracted for, or to bind the County by terms of credit. But this left to the vendor and his assigns two courses. One of rescission, as above discussed, the other of waiver of the mistake and enforcement of the contract.

What were the rights as to this latter alternative?

The County would be estopped from denying the indebtedness, having taken and retaining possession.

But when payable, when suable?

Admit for this purpose, that the vendor, if he abides by the contract, waiving the mistake, must give the County the credit stipulated, can he then sue in any form when the credit has expired?

Here we must go to the Nebraska statutes and the decision referred to:

1 Nebraska, 382, settles that an indebtedness by county warrants accepted by the Treasurer, without funds, cannot be sued till funds are collected, or a reasonable time has been had to collect. This case shows that the County had no funds and never has had them collected for this purpose. The County warrants actually issued in part payment were bonded ten years after, and the bonds do not appear to have been yet paid. The County, then, to this day, according to that decision, is not liable to be sued on the ground of having the money collected to pay, but, if at all, on the other ground, that reasonable time has elapsed for them to have levied and collected.

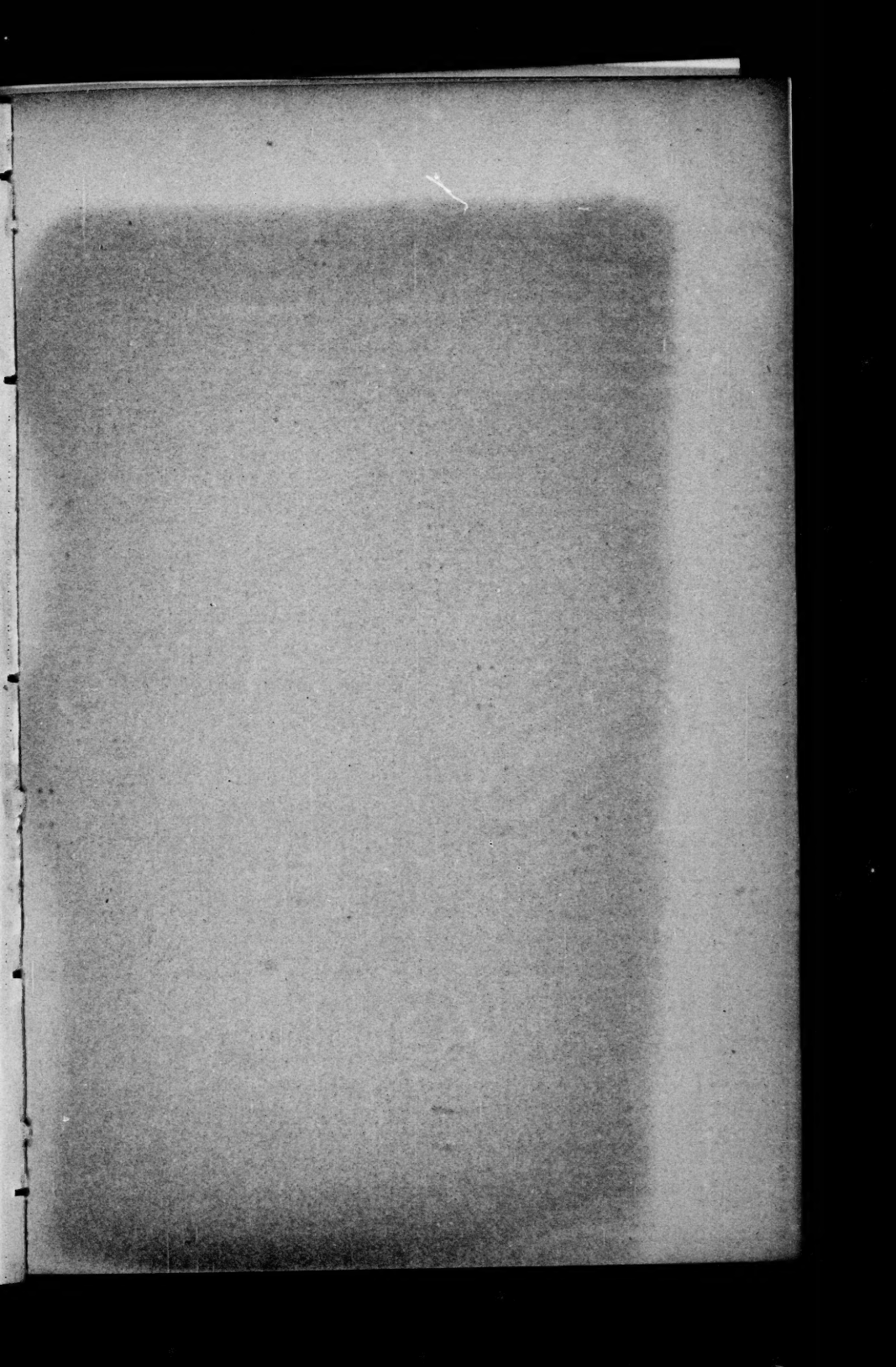
But the decision in 1 Nebraska, *supra*, goes to another point, to wit: that causes of action on county warrants are not within the Statute of Limitations. And if county warrants, accepted by the Treasurer, are not within the statute, then on the same principle as there presented, other contracts to pay money to be raised *in futuro* by tax, are not within the statute.

If so, then here is an existing indebtedness not affected by any statute; but even if so, protected by the minority of W. A. Ely, and cognizable in equity, first, because of the vendor's lien, to be enforced, or second, because the County having the right at law to disaffirm the contract as made, and to deny indebtedness, the estoppel to such denial in case they retain the land can properly be applied in equity; or, third, because the indebtedness being disputed, and an accounting, in any event, to be had between the parties, and to be followed by a decree ordering the county to levy, collect and pay the amount

found due, proceedings in equity are appropriate for such hearing and relief.

We submit that under either of the above two views, Complainants may have relief.

GEORGE WILLEY,
C. C. BONNEY.



OFFICE SUPREME COURT U. S.
FILED
DEC 16 1882
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

October Term, 1882, No. 143.

HENRY Z. CHAPMAN, *et. al.*, APPELLANTS,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DOUGLAS.

BRIEF AND POINTS FOR APPELLEE.

J. C. COWIN,
Solicitor for Appellee

J. M. WOOLWORTH,
Of Counsel.

F. C. Festner Steam Printer Omaha, Neb.

In the Supreme Court of the United States.

October Term, 1882, No. 143.

HENRY Z. CHAPMAN, *et. al.*, APPELLANTS,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DOUGLAS.

BRIEF AND POINTS FOR APPELLEE.

This is an appeal against a decree of the Circuit Court of the United States, for the District of Nebraska.

STATEMENTS OF FACTS.

The bill was filed on the 10th of September, 1877, by Henry Z. Chapman, Heman Ely, Executor of the last will of Charles A. Ely, Louise C. Ely, and William A. Ely, an infant, by Louise C. Ely, his Guardian, against the corporate authority of Douglas county. The facts necessary to be stated in order to the determination of the case are few and simple. They are as follows:

On the 4th of March, 1854, an agreement was entered into between Henry Z. Chapman of the one part, and the county of Douglas of the other part, whereby Chapman agreed to sell and convey to the county two parcels of land, one containing one hundred and sixty acres, and the other ten acres; and the county agreed to pay therefor

$2,000 in county orders, "and the balance of $6,000 in four equal annual payments, together with interest on the amount due at ten (10) per cent. per annum until paid." Upon the payment of the $2,000 orders Chapman was to put the county in full and peaceable possession. The deferred payments were to be secured by mortgage on the premises. (See Record, P. 37, Fol. 83 & 84.)

On the next day Chapman conveyed the two parcels of land to the county with warranty; it made to him its notes, payable respectively in one, two, three and four years, for the aggregate sum of $5,000, and a mortgage on the premises to secure their payment. The county at once entered into possession, and has improved the lands to the extent of $30,000. (P. 47, Fol. 101.) The lands were purchased for a farm for the poor of the county, and have always been used for that purpose.

On the 26th of November, 1860, Chapman sold the notes to Charles A. Ely. On the 1st of September, 1861, Ely was adjudged insane, and on the 30th of September, 1864, he died, leaving a will, whereof he appointed Heman Ely executor, and to him he bequeathed all his real and personal estates. (See allegation of the bill, P. 4, Fol. 11.) He also left Louise C., his wife, and William A., a minor, his son, in trust for whom the bequests were made. On the 11th of November, 1864, the will was admitted to probate in the Probate Court, and on the 16th of the same month Heman Ely was appointed Executor thereof. From that day to the 10th of September, 1877, is twelve years, ten months and six days.

At a day which is neither alleged nor proven, the

Supreme Court of the State decided that the authorities of a county were not competent to mortgage lands purchased for a farm for the poor to secure the purchase price thereof. The representatives of Ely have applied to the County Commissioners for payment of the notes, but for reasons not deemed by us material at this point to mention, they have not been paid. So, too, several suits for the foreclosure of the mortgage have been brought, but they have been dismissed without prejudice before reaching a final decree. The ten acre tract was wood land, and for that reason was very valuable, but the title to it failed shortly after the purchase.

NATURE OF THE CASE SOUGHT TO BE MADE IN THE BILL.

Stripped of all circumstances, the case in its essential facts is this: Chapman sold and conveyed the lands to the county, and the county has not paid for them.

The prayer shortly stated is, that if the county affirm the purchase it be decreed to pay what is due on the agreed price of the land; or if the county repudiate the sale that it be decreed that it holds the land in trust for Chapman and his legal representatives; that it pay what upon an accounting may be found due for rents and profits, and re-convey the premises and surrender possession to Heman Ely as Executor.

It thus appears that the theory of the bill is, that the title passed to the county, and that because it has not paid therefor it should be decreed to do so, or re-convey the title and surrender the possession. And this was right.

For while the bill alleges that the Supreme Court of the State held that the county had authority neither to purchase on credit nor to give a note and mortgage to secure payment of the purchase price, (P. 5, Fol. 13,) the answer alleges that the decision was that: "It was not competent for the Commissioners of a county to make notes and a mortgage upon lands purchased by them for a poor farm to secure payment of the purchase price thereof." (P. 12, Fol. 35.) And this was all that the Court decided.

That decision was made in the case of Stewart *vs.* Otoe county, and is reported in 2 Neb. 177. The parties entered into a contract whereby the Plaintiff agreed to sell and convey to the county lands for a poor farm, and to give credit for a part of the purchase price, which the county agreed to secure by mortgage on the premises. The county refused to perform the contract and the vendor sued to recover his damages arising from the breach of the contract. At page 133, Lake, J., speaking for the Court, said:

"First, then, had the County Commissioners authority to bind the county of Otoe in a contract of the character of the one set forth? If they had, the ruling of the District Court upon the demurrer cannot be sustained. That the County Commissioners may purchase a poor farm for the county is clear; but can they execute notes and mortgage in the name of the county in payment of the purchase money? This the contract stipulated should be done; and, because it was not done, this suit was brought.

"There is no authority of law for the County Commissioners to bind the county in the manner contemplated.

They cannot give a promissory note, nor can they mortgage the property of the county. Should they formally do so, their action would be a nullity. In the purchase of land for a poor farm, the authority of the Commissioners of a county is very clearly set forth. The mode of raising the money, and paying it over, are all definitely stated. These statutes set a limit, beyond which they cannot go. They are a guide, not only to the Commissioners, but equally so to all persons dealing with them, who must see to it that their contracts are within the boundaries thus described. To maintain an action against a county upon a contract, it must be shown that in respect to both its subject matter and terms, it is within the statute.

"Sec. 17, Chap. XL, provides: 'That the County Commissioners in each county are authorized, whenever they see fit to do so, to establish a poor-house'; and the next section provides that 'they may take to the county by grant, devise, or purchase, any tract of land not exceeding six hundred and forty acres, for the purposes of said poor-house.' Now, having authorized the purchase of the land for the purposes of a poor-house, how may they pay for it? Sec. 19 of said chapter declares that said Commissioners are hereby empowered to receive donations to aid in the establishment of such poor-house; and also empowered from time to time, as they shall see fit, to levy and collect a tax, not exceeding one per cent. on the taxable property of the county, and to appropriate the same to the purchase of land, not exceeding the aforesaid six hundred and forty acres; and to erect and furnish buildings suitable for a poor-house, and to put into opera-

tion and to defray the actual expenses of said poor-house should the labor of the inmates be inadequate thereto. By Sect. 23 of the same chapter, the Commissioners are authorized, if they deem it for the interest of the county, to appropriate out of any other money belonging to the county any sum not exceeding two thousand five hundred dollars, for the purpose of purchasing a farm, and erecting thereon suitable buildings, as contemplated in the sections before referred to.

"Here we find the authority, and indeed the only authority, for the purchase and payment of money for a 'poor-farm' by the County Commissioners; and here, too, are specially designated the money that may be used for that purpose, together with the mode of raising it. But there is not one word about mortgaging the property of the county to secure the payment of the purchase-money at a given time. The statutes provide the only security that can be given. The public faith is pledged; and a tax, not exceeding one per cent., may be levied upon all the taxable property of the county annually, and, when collected, paid to the person entitled thereto by an order upon the treasurer of the county, payable out of that special fund. If the Commissioners could pledge the property of the county by mortgage, it would follow that, if the debt secured were not paid at its maturity, an action could be at once instituted to foreclose the equity of redemption, subjecting the county necessarily to expensive litigation. This result was never intended by the Legislature; and therefore the authority to pledge the property of the county as security for the payment of its indebtedness has been most

wisely withheld from its agents. A mortgage of property is but a conditional sale, and may result in a complete divestment of all the owner's interest therein; and not only is there no express authority given in our statutes to the County Commissioners to mortgage the real property of the county, but their right to sell or transfer it in any manner is most carefully guarded; for in no case can they do so unless first authorized by a majority vote of the electors of the county, as provided in Sec. 16, Chap. IX., of the Revised Statutes.

"We conclude, therefore, that the contract upon which the breach is assigned was not within the statutes; that the county of Otoe was not bound by its terms; and that the refusal of the County Commissioners to abide by its provisions furnishes no cause of action to the plaintiff. The ruling of the District Court upon the demurrer was correct; and its judgment must be affirmed."

From which it appears that the county was competent to take the title but not to mortgage it to secure the purchase price.

In view of this judgment this bill was rightly framed on the theory that the title passed from Chapman by his deed and was vested in the county, and that neither Chapman nor his assignees could complain if paid the agreed price.

The cause was heard upon pleadings and proofs in the Circuit Court before Mr. Justice Miller, who rendered a decree dismissing the bill, and the plaintiffs have appealed to this court.

FIRST POINT.

THE STATUTE OF LIMITATIONS.

The case is barred by the statute of limitations. The contract of purchase dated March 5th, 1859, gave on the deferred payments one, two, three and four years. The last expired March 5th, 1863. At that time Ely being insane he could not sue; but he died September 30th, 1864, and the plaintiff Heman Ely was duly appointed executor of his will on the 16th of November following. This bill was filed September 10th, 1877,—twelve years, ten months and six days after the right of action accrued, and there was a party competent to sue.

I. The first question which presents itself is, what provision of the statute is applicable to this case.

When the transaction of March 5th, 1859, took place the limitation to actions for the recovery of title to lands was as follows:

"An action for the recovery of the title or possession "of lands, tenements or hereditaments can only be brought "within twenty-one years after the cause of such action "shall have accrued." (R. S. 1866, P. 395, Sec. 6.)

On the 12th of February, 1869, the Legislature passed the following act:

"Sec. 1. Be it enacted by the Legislature of the State of Nebraska, that Section 6, Part 2, of the code of civil proceedure, and which is in the following words, to-wit: 'Sec. 6. An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within twenty-one years after the cause of

such action shall have accrued,' be amended so as to read as follows, to-wit: Sec. 6. An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages.

"Sec. 2. Section 6 of the act to which this act is an amendment and all other acts and parts of acts inconsistent with this act are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after the first day of July, A. D. 1869.

"Approved February 12th, 1869."

The appellant claiming that this is a suit for the recovery of title to lands within the meaning of the provision of the statute relating thereto, insists that the law in force when the contract was made governs here, and not the act of 1869.

His contention is understood to be as follows:

1. As the county claims that the notes and mortgage are *ultra vires* it cannot claim the credit allowed thereby; so that the whole debt became due as soon as the land was conveyed, that is to say, on the 5th of March, 1859.

2. The time limited in the act of 1869 for the bringing of actions to recover title to lands being ten years, the whole of that period had run before that act had come into force, which was July 1st, 1869, so that to apply that act to the case would deprive the plaintiffs of all remedy.

3. Therefore, for the purposes of this case, the former act allowing twenty-one years to bring actions to recover title to lands is not repealed.

For the purposes of the argument it may be admitted that this is a suit within the clause of the statute referred to, and that if we repudiate the notes we ought not to have the credit allowed by their terms. So too, we are quite ready to admit that a statute which cuts off all remedy is bad. And yet with all these concessions the argument is not made out. The defect lies in the assumption that the terms of the notes are what secured the credit; so that the repudiation of them estops us from claiming the time of payment specified therein.

The fact is that the county became entitled to the credit, not at all by reason of the notes or the time allowed by them, but by the contract of purchase, the terms of which upon this point were as follows: "That the party of the first part shall pay to the party of the second part, at the ensealing and delivery of a warrantee conveyance from the party of the first part to the party of the second part of the real estate aforesaid, two thousand dollars ($2,000.00) in county orders of the county of Douglas aforesaid on the treasurer of said county, and the balance of six thousand ($6,000.00) in four equal annual payments, together with interest on the amount due, at ten (10) per cent. per annum until paid."

In fact the notes are not so much as mentioned in that contract. Suppose the notes had never been given; and Chapman discovering the invalidity of the mortgage had disregarded it and sued the county for the $5,000, the amount of deferred payments, when would his right of action have accrued? Obviously when the credit stipulated for in the contract had expired. The appellant

disregards the contract and assumes that the county is entitled to credit only by reason of the notes: this is not justified by the facts. Let the notes and the mortgage be disregarded, and still the county is entitled to the credit. The fault in the premise of the argument of the appellant vitiates the whole of it. There was time namely from July 1st, 1869, when the new statute came into force, to March 5th, 1870, when the credit allowed for the first payment expired, for bringing the suit. It was a period of eight months, which was not so unreasonably short as to subject the act to objection on the ground stated. Terry *vs.* Anderson, 95, U. S. 628.

But this is not an action for the recovery of the title or possession of lands within the meaning of the statute of limitations. The attempt to give it that complexion is futile and the argument founded on it is specious. As has been said, the bill alleges and the whole theory of the appellants is that the title passed from Chapman to the county. The only complaint made by the appellants is that they have not been paid the purchase price of the land. There is no clause in the deed made by Chapman, nor in the contract, forfeiting the title in case of non-payment or upon the happening of any other event. Because the price was not paid by the county, ejectment would not lie to recover possession; nor would a suit in equity, to recover the title.

This bill is framed not for the recovery of the legal title which Chapman conveyed to the county as its primary object: it seeks to compel the payment of the purchase price of the land; and prays a reconveyance as a measure

of coercion, only in the contingency of the county repudiating the purchase. Had it sought a reconveyance as its only relief it would not have been good on general demurrer. A vendor who has conveyed his estate but has not received the consideration, may have his lien declared and enforced by sale, but he cannot have a reconveyance simply because he has not been paid the purchase price. Nor can he have relief by way of rescission on that ground. There must be other elements of a more serious nature. Suppose Chapman had discovered that the mortgage was invalid when the last note matured and had then brought his bill for rescission, would that mode of relief have been allowed? Certainly not if the county had offered to pay for the land. And if he could not have had rescission then, he could not at any future day; which proves conclusively that a bill to recover the title is not and never was his remedy and is not the remedy here sought. So that we are under no necessity to consider the clause of the statute limiting the bringing of such suit.

The appellants further contend that because the plaintiffs did not know what the law was, until the Supreme Court of the State decided that it was not competent for the authorities of a county to mortgage its lands purchased for a poor farm, of the time of which decision we are not informed, the case is governed by the rule that until the discovery of the mistake the statute does not run. If the rule were as claimed, it would not apply to a mistake which everyone is conclusively supposed to know. But the mistake of the appellants about the validity of the mort-

gage under the circumstances here does not prevent the statute running.

The other clauses of the statue are as follows:

"Sec. 9. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued:

"Sec. 10. Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment.

"Sec. 11. Within four years, an action upon a contract, not in writing, expressed or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

"Sec. 12. Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud; but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

"Sec. 16. An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued."

They were in force at the time of the transaction of March 5th, 1859, and have continued in force ever since.

Whether this bill be based on an agreement, contract, or promise in writing, or on a contract not in writing, expressed or implied, or for relief not otherwise provided

for, it is barred by the terms of this statute. In order to avoid the bar of the statute the appellants contend that by reason of the nature of the case, no limitation ought to be, or by law is prescribed, within which the bill must be brought.

II. One of these grounds is that the bill is to have a vendor's lien declared and enforced, and for that reason it is not within the statute. This is a question which is answered by the authorities.

Sugden (2 Vend.[679]) says: "The lien is a burden, but not arising upon an express trust, and therefore it may be barred by the statute of limitations."

Jones (1 Mort. Sec. 218) says: "The vendor's lien existing solely in the debt, and being a mere remedy or security for this, cannot be enforced when the debt itself cannot be enforced; and consequently it is barred by the same lapse of time that bars the debt. Moreover this lien has no existence until it has been declared to exist by a court of equity; and if the debt is gone before the lien is established, there can be nothing to establish the lien for. It cannot exist distinct from the debt."

Perry (Trusts §234,) says: "In most cases the *cestui que trust* has an equitable estate in the land to which his trust attaches; an estate which he may sell, assign, or devise; but a vendor having only a lien for his purchase money, has no estate in the land. It is neither *jus in re* nor *jus ad rem*. It is the mere possibility of a right, until it is established by a final decree of a court in each case. It is not a direct trust in the land itself, but a collateral trust for the security of the debt. It is in fact a remedy

for a debt, and not a right of property. It follows, that the remedy can be enforced only so long as the debt can be enforced; that where an action for the purchase money is gone, the right to enforce the lien, or the lien itself, is gone also. This lien or trust continues so long as the purchase money remains unpaid, or so long as an action can be maintained for its collection. If the action is barred by the statute of limitations, the remedy to enforce the lien is gone also. In this respect the vendor's lien differs from the mortgage, which may be enforced against the land after all right to enforce the debt against the mortgagor is barred by the statute of limitations, or by his discharge in bankruptcy. If a *cestui que trust* conveys his equitable estate in land, he will have the same lien upon it for the purchase money as in the case of a legal estate."

In Toft *vs.* Stephenson, 7 Hare 1, the facts so far as the question here under discussion are concerned, were briefly: That on the 4th of March, 1811, a contract was made for the sale and conveyance, surrender and assure of on the same day copyhold lands, the purchase-money to be paid on the 13th of May following. The purchaser was let into possession immediately on the execution of the contract. No deed seems to have been made. On the 29th of January, 1844, the assignees of the vendors filed their bill against the heirs, representatives and assigns of the purchasers, claiming a lien on the premises for the amount of the purchase money with interest from the date of the contract, and praying a declaration accordingly, and that the defendants pay the amount due, or that the same be raised by sale or mortgage of the estate. The defend-

ants admitted that the purchase money was unpaid, but claimed the benefit of the statute of limitations.

Sir James Wigram, V. C., commenced his judgment by saying: "The plaintiffs by their bill claim a lien on the estate contracted to be sold, for the amount of the purchase money and interest. The bill asserts no other equity. That is material, for it brings the case under the statute 3 and 4 Will. 4 c. 27. For the limitation of actions and suits relating to real property.'"

The 24th and 25th sections of the statute are as follows:

"XXIV. And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

"XXV. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then

be deemed to have accrued only as against such purchaser and any person claiming through him."

The Vice-Chancellor says: "The second point was much labored at the bar. It was contended, that the relation of vendor and purchaser, before the payment of the purchase money, was that of trustee and *cestui que trust*, and that the case was therefore within the 25th section of the statute. I do not mean to question the doctrine stated by Lord Hardwicke in Green *vs.* Smith: but I am under no apprehension of being thought to have done so, by saying that the trust existing between the vendor and purchaser is not an express trust, within the 25th section of this statute. The observations of Sir William Grant, in Beckford *vs.* Wade, with which every one is familiar, upon the distinction of trusts which are actual and express, as between the *cestui que trusts* and trustee properly so called, on the one hand, and constructive trusts on the other, are conclusive upon this point. 'If,' as that learned judge observed, 'every constructive trust is to be dealt with as an actual and express trust, within the statute of limitations, I hardly know how any suit in equity could be barred by the statute. Upon what grounds is a court of equity ever called upon to direct one man to convey a real estate to another, except upon the ground of a trust, either actual or constructive!' A trust by which a person undertakes to hold and apply property for the benefit of another, is widely different from the case of ownership, subject to the claim of another, if he thinks proper to enforce it. But, leaving this general reasoning, how is it possible to hold, that the common lein of vendor

can be an express trust, within the 25th section, to which, in the absence of special circumstances, no length of time is a bar, where the 40th section of the act makes twenty years a bar to every lien upon land."

* * * * * * *

The case was carried to the Court of Appeals in Chancery where new evidence of a written admission of the debt at a time within the statute was received, upon which relief was grounded without questioning the correctness of the Vice-Chancellor's judgment. Toft *vs.* Stephenson, 1 De G. M. and G., 28.

The case was again before the Court upon the question whether the admission as to the principal of the debt extended to interest due more than five years before the bill was filed. The correctness of the Vice-Chancellor's judgment was unquestioned. Toft *vs.* Stephenson, 5 De G. M. and G., 735.

Borst *vs.* Corey, 15 N.Y. 505, was an action in equity to enforce a vendor's lien against an estate sold and conveyed ten years before the bringing of the action Bowen, J., delivering the opinion of the Court, said: "The purchase price of the land in question was due and payable on the conveyance of the land to the defendant Corey, and as this action was not commenced until more than six years after the conveyance, and as no promise to pay was shown to have been made within six years, the statute of limitations would have been a complete bar to an action at law to recover the purchase price. This action, however, was one of the equitable cognizance. At the time of the commencement of the action, the relief sought to be obtained

in the manner applied for, that is, by the sale of the premises under the equitable lien thereon for the purchase price, could have been awarded by a court of equity only.

"An action at law, if commenced at any time within six years after the conveyance, could have been maintained against the defendant Corey, in which a judgment against him personally would have been rendered. The object of such an action, and the relief sought for therein, would have been the recovery of the unpaid purchase price of the land. The same relief, and no other or different, is sought to be obtained in this action, and a court of equity was resorted to solely for the reason that courts of common law jurisdiction could not award relief otherwise than by a judgment against the defendant personally. The same facts which would constitute a defence to the action at law would also be a defence to this action, unless the statute of limitations be an exception. So, too, the cause of action, to-wit, the non-payment of the purchase price of the land, is the same, whichever court is resorted to.

"It is true that, to sustain the suit in equity, the plaintiff must bring to his aid the equitable lien given by law, while the action at law can be sustained without reference to such lien. But the lien is merely an incident to, and must stand or fall with the debt. The debt is the basis and foundation of the lien. The latter cannot exist without, or independently of the former. In the suit to enforce the lien the cause of action, and the only substantial cause of action, is the debt.

"The forty-ninth section of the title of the Revised

Statutes, entitled 'Of the Time of Commencing Actions,' provided, that 'whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, *of any cause of action*, the provisions of this title, limiting a time for the commencement of a suit *for such cause of action*, in a court of common law, shall apply to all suits hereafter to be brought *for the same cause* in the court of chancery.' I do not see why this case does not come within the letter of the above provision. It certainly does, if I am right in supposing that the defendant's indebtedness for the purchase price of the land constitutes, in the language of the statute, the plaintiff's '*cause of action*.'"

Moore *vs.* Anders, 14 Ark. 628; Linthicum *vs.* Tapscott, 28 Id. 267; Cooper *vs.* Lowery, 54 Ga. 198; Trustees *vs.* Wright, 11 Ill. 603; 12 Id. 432; Trotter *vs.* Erwin, 27 Miss. 772; Littlejohn *vs.* Gordon, 32 Miss. 235; Avent *vs.* McCorkle, 45 Miss. 221; Fullerton *vs.* Spring, 3 Wis. 667; Sheratz *vs.* Nicodemus, 7 Yerg. 9; Ray *vs.* Goodman, 1 Sneed 586; Gudger *vs.* Barnes, 4 Meisk. 570; Gibbs *vs.* Holmes, 10 Rich. 484; Addams *vs.* Hefferman, 9 Watts. 530; Alexander *vs.* McMurry, 8 Ib. 504; Hanna *vs.* Wilson, 3 Grattan 243.

But the case at bar is to be determined not so much by the authority of judgments delivered upon statutes of limitation, in terms applicable to legal actions, as upon the statute of Nebraska read in its natural sense. It must be admitted that it was competent for the legislature to say to vendors of lands, that they should bring their actions to enforce their liens upon estates sold by them for unpaid purchase-money within a prescribed time or they should

not have that remedy. And the question only remains, has the legislature of Nebraska done so?

Mr. Justice Field, speaking, in Hardy *vs.* Harbine, 4 Sawy., 535,548, of the statute of California, the form of which is the same as that of Nebraska, says: "The statute of limitations of this state is peculiar. It differs essentially from the English statute, and from the statute of limitations in force in most of the other states of the Union. Those statutes in terms, apply only to particular legal remedies, and courts of equity are said to be bound by them only in cases of concurrent jurisdiction, and in other cases to act only by analogy to the statutes, and not in obedience to them. But in this state the statute applies both to equitable and to legal remedies. It is directed to the subject matter, and not to the form of the action or the tribunal before which it is prosecuted. Such is the language of the Supreme Court, the only authoritative interpreter of the laws of the state. (Lord *vs.* Morris, 18 Cal., 436.)"

III. The attempt to take the case out of the statute is renewed under the position that the relations of the county and Chapman were those of trustee and *cestui que trust*. This is really the same contention as that upon the doctrine of vendor's lien, under another name; for that doctrine proceeds entirely upon the theory that between the parties to a sale of realty, where the purchase price is unpaid, there is a trust relation. When, therefore, we show that the statute bars a bill to enforce a vendor's lien we show that the doctrine of trusts does not avoid the bar. In passing from the argument to support the vendor's lien to that in support of a trust there is a change of names,

but there is no change of principle. But we will examine the appellants' argument under the guise of the doctrine of trusts.

It seems to be conceeded in the argument of the appellants that it is not all trusts which are withdrawn from the statute, but only those are without its operation which are known as express trusts. The whole effort of the learned counsel is to make it appear that in the case of a vendor and purchaser of lands where there has been a conveyance, but the purchase money remains unpaid, is an express trust, and therefore that it is not within the bar of the statute.

With this admission it devolves on the appellants to show that the trust, which is raised by a sale and conveyance without payment of the consideration, is an express trust and not an implied trust.

In the citations above from Sugden, Jones and Perry, and in the judgment in Toft *vs.* Stevenson, and several other judgments, it is declared to be an implied and not an express trust.

Express trusts, often called direct trusts, are generally created by instruments that point out directly and expressly the property, persons and purposes of the trust. They are so called in contradistinction to such as are implied, presumed, or constructed by law. Implied trusts are those that the courts imply from the words of an instrument where no express trust is declared, but such words are used, that the Court infers or implies that it was the purpose or intention of the parties to create the trust.

Perry on Trusts, Sec. 24 and 25.

The test is not whether the trust arises out of a transaction which the parties have reduced to writing, but whether the writing expresses the trust so clearly that nothing is left to implication. Here, then, were writings, namely, the contract, the deed of Chapman, and the notes and mortgage of the county. But they express no trust: the law must imply a trust, if there be one, from the circumstances of a conveyance and non-payment of the consideration.

Boone *vs.* Chiles, 10 Peters, 177, 222, *et pas.*
Blight's lessee *vs.* Rochester, 7 Whea., 535.
Beaubien *vs.* Beaubien, 23 How., 190.
Beckford *vs.* Wade, 17 Ves., 87, 96.
Perry on Trusts. Sec. 122.

There is another decisive answer to the contention of the appellants that the trust-relation between the parties avoids the bar of the statute.

It is admitted by the learned counsel that it was as early as 1871, that the Supreme Court of the State decided that it was beyond the competency of the authorities of the county to mortgage lands, purchased for a poor-farm in order to secure the consideration. It was as early as 1865 that the executor of the will of Ely applied to the county to pay the notes. (P. 18, fol. 51; p. 20, fol. 54.) These applications were renewed in 1867 by Mr. Poppleton (p. 32, fol. 75) and by Mr. Wakeley in 1871 (p. 26, fol. 65). These applications were declined, in a manner sufficiently decisive for the appellants to bring suits, one in 1868 and the other in 1869. Both were defended by the county and its defense sustained. So that, as early at least as

1871, it came to the knowledge of the appellants that the county did not intend to pay the debt unless compelled to do so by judicial proceedings. This bill was not filed until 1877. In such a case the trust-relation will not prevent the bar of the statute from running.

Amory *vs.* Lawrence, 3 Clif., 523, 531,
Willison *vs.* Watkins, 3 Pet., 43.
Angel on Limitations, Sec. 472.
Perry on Trusts, Sec. 864.

IV. So, too, the contention that the county is guilty of a continuing fraud in keeping the property without paying for it, is equally applicable to all parties who have obtained property fraudulently, for they are guilty so long as they keep it; and yet, for reasons of the highest public policy, the legislature has refused all remedy against them, unless the injured party makes his complaint within a limited time after being informed of his injury.

SECOND POINT.

This bill could not be maintained if it were not barred. It is attempted to be supported on so many different grounds that the examination of each may be somewhat tedious. But in no aspect which can be given it can it be supported. That in which the attempt is most earnest, is that it is to enforce the lien of the plaintiffs as vendors; to which several reasons are fatal.

I. The first reason is that the jurisprudence of Nebraska does not recognize the equitable principle that the

vendor retains a lien upon premises the title to which he has duly conveyed. This was ruled in the case of Edminster *vs.* Higgins, 6 Nebr., 265. Higgins, the plaintiff, sold the premises in question to William Adams and conveyed them to him with warranty, and took two promissory notes for the unpaid purchase-money. Adams died intestate. The defendants in the action were his heirs and Edminster who was the administrator of his estate. The prayer of the petition was for a vendor's lien and a sale of the premises There was a general demurrer to the petition. Maxwell, J., states in the opinion of the Court the origin and nature of the vendor's lien, and then says:

"Section sixteen, chapter 61, Genl. Statutes, 875, provides that 'All deeds, mortgages, and other instruments of writing, which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to creditors and subsequent purchasers in good faith without notice. And all such deeds, mortgages and other instruments shall be adjudged void as to all creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded; *provided*, that such deeds, mortgages, and other instruments shall be valid between the parties.'

"Section fifty, Genl. Stat., 881, provides that: 'Every conveyance of real estate shall pass *all the interest of the grantor therein*, unless a contrary intent can be reasonably inferred from the terms used.' The obvious intention of the registry acts is to give notice to all persons who may have occasion to ascertain whether there has

been any prior incumbrance or conveyance of any real estate. And the notice given by the record is as effectual in law as personal notice to the party to be affected by it. The policy of our law is to discourage secret leins, and to require all instruments affecting the title of real estate to be entered of record. The law thus places the means within the reach of every one desiring to purchase real estate of ascertaining the condition of its title.

"What is a vendor's lien? We are told that it is an equitable mortgage for the amount of purchase money of real estate remaining unpaid. But an equitable mortgage grows out of an agreement that a lien shall be created, while a vendor's lien in a case like the one at bar arises, if at all, without a contract, and against the express terms of the deed. Neither is it in the nature of a trust. There is no agreement of any kind that the land shall be held as security for the payment of the purchase-money. This is a case where credit was deliberately given, trusting to the solvency of the debtor, and notes, payable in the future, were received by the vendor for that portion of the purchase-money on which credit was given. It is difficult to perceive how the land can be charged with a lien not contemplated by the parties. The case would be entirely different if the sale had been for cash, and the deed had been delivered before the payment of the consideration. Then the vendee becomes a trustee for the purchase money, and the estate purchased is charged with the trust in the hands of any one except an innocent purchaser without notice.

"In Gilman *vs.* Brown, 1 Mason, 192, Story, J., says:

'The lien of a vendor for the purchase-money is the mere creature of a court of equity, which it moulds and fashions according to its own purposes. It is, in short, a right which has no existence until it is established by the decree of a court in the particular case, and is then made subservient to all the other equities between the parties.'

"Blackstone says: 'Hard is the common law still subsisting, that land derived or descending to the heir shall not be liable for simple contract debts of the ancestor or devisor, although the money was laid out in *purchasing the very land.*' Blackstone Com., Book III, 430.

"This provision of the common law doubtless had great influence in leading the Court of Chancery of England to adopt the doctrine of vendor's lien from the civil law to prevent a failure of justice. But this doctrine can have no application in this state, where debts are a charge upon the lands of decedents, and where the estate descends or is devised subject to such debts. We are clearly of opinion that the doctrine of vendor's lien in a case like the one at bar, is repugnant to our statutes in relation to real estate, and is therefore no part of our law. It follows from these views that the judgement of the District Court must be reversed and the cause dismissed."

This judgment assuming that the vendor's lien is a doctrine of equity, holds that it has been displaced in Nebraska by statute: it proceeds entirely upon a construction of the statutes of the state, and it concerns the title to lands. It is, therefore, conclusive in this court.

The case has been approved in Rhea *vs.* Reynolds, 12 Neb., 128. At page 133, Mr. Justice Maxwell, speaking

for the whole Court, says: "We adhere to our decision in Edminster *vs.* Higgins, 6 Neb., 265, that a vendor of real estate, upon an actual conveyance thereof by deed, has no lien upon the land so conveyed for such portion of the purchase-money as remains unpaid. The reason is, the grantor has parted absolutely with all claims and demands upon the land, and cannot be allowed to enforce special demands against it not arising by contract or operation of law. But a vendor's lien may be created by the contract of the parties at the time for the sale a ndconveyance of the land, and will exist where the purchase-money or a part thereof remains unpaid, if the vendor has only executed a bond or contract to convey. Stevens vs. Chadwick, 10 Kas., 406. Smith vs. Rowland, 13 Id., 245."

It is unnecessary to inquire into the correctness of the decision of the Supreme Court of Nebraska; but it may not be improper to say that it agrees with the opinion of other courts of the very highest respectability. In Pennsylvania the whole principle has been rejected; a vendor after an absolute conveyance of the legal title, has no implied lien for the purchase money. Kauffelt *vs.* Bower, 7 S. & R. 64; Semple *vs.* Burd, Id. 286; Mergargle *vs.* Saul, 3 Wharton, 19; Hepburn *vs.* Snyder, 3 Barr, 72, 78. In North Carolina, after some fluctuation of opinions, (Wynne *vs.* Alston, 1 Devereaux's Eq., 163; Johnson *vs.* Cawthorn, 1 Dev. & Battle's Eq., 32; Crawley *vs.* Timberlake, 1 Ired. Eq., 346, 348,) the doctrine of an implied lien after an absolute conveyance is now entirely expelled. Womble *vs.* Battle, 3 Ired. Eq., 182, 184. In South Carolina, also, it appears to be completely rejected.

Wragg's Representatives *vs.* Comp. Gen. and others, 2 Dess. 509, 520. In Massachusetts, Maine and Kansas it has no existence. Gilman vs. Brown, 1 Mason, 192, 219; Philbrook vs. Delano, 29 Maine, 410, 415; Ahrend vs. Odiorne, 118, Mass., 263; Brown vs. Simpson, 4 Kansas, 76. In Deleware and Connecticut its existence remains undecided and doubtful. Atwood vs. Vincent, 17 Conn., 576, 583. Budd vs. Busti, 1 Harr, 69, 74.

In some of the courts in which its existence has been recognized, it has been considered as a dangerous principle, opposed to the prevailing policy of this country, which discourages secret liens, and tends to make all matters of title the subject of record evidence. See remarks of Marshall, C. J., in Bayley vs. Greenleaf, 7 Wheaton, 46, 51; of Carr, J., in Moore vs. Holcombe, 3 Leigh, 597, 600, 601; of Tucker, P., in Brawley vs. Catron, 8 Id. 522, 527; and of Treat, J., in Conover vs. Warren et al., 1 Gilman, 498, 502.

II. There is another fatal objection to this bill.

It is alleged that on the day on which Chapman conveyed the premises to the county, the Commissioners thereof made to him four several promissory notes for $5,000 in the aggregate, and a mortgage upon the premises; and "that at the time of the making of and delivery of said notes and mortgage it was mutually believed, both by said commissioners and said Chapman, that said county had full power and authority to purchase said lands, and to execute for the unpaid part of the purchase money thereof the notes and mortgage above described, and that all the actings and doings both of said commissioners on behalf

of said county and of said Chapman in that behalf were had, made and done in perfect good faith, and for good and sufficient considerations, in all things conformable to good conscience and equity." (Bill, Par. II and III, P. 3.)

Consider the case in the first place as if the notes and mortgage were, when made, good and valid in law.

Our first observation is, that the question whether there remained in Chapman's favor a lien for the unpaid purchase-money is one of intention, to be determined by the acts of the parties. If by any decisive act, they evinced a purpose on the part of the vendor to waive the lien, then it was gone; on the other hand, if from what they did, we can see a purpose to preserve the lien upon the estates conveyed, then it subsists; providing, of course, this equity exists in the jurisprudence of the state, and is not barred by limitation of law. The question then, is: What was the intention of these parties.

In the well-known case of Gilman vs. Brown, 1 Mason, 191, Mr. Justice Story says, at page 213, "The rule, however, is manifestly founded on a supposed conformity with the intention of the parties, upon which the law raises an implied contract; and therefore it is not inflexible, but ceases to act where the circumstances of the case do not justify such conclusion."

In Cordova vs. Hood, 17 Wall. 1, Mr. Justice Strong, speaking for the whole court, without repeating this familiar rule, entered into a careful examination of the acts of the parties, in order to discover their intention in respect

of the lien, whether to waive or to save it. There are many cases to this effect.

Our second observation is, that taking a note and mortgage upon the estate conveyed raises a presumption that the vendor intended to waive his lien. This is apparent upon a moment's consideration of the natural conduct of men. If I sell and convey an estate without receiving the consideration therefore, it is reasonable to suppose that I look to the property out of which I shall be paid; and therefore, the law gives me a lien upon it for the purpose. But if I take a mortgage of the estate to secure my debt, it is quite as reasonable to suppose that I waive the right which I would otherwise have. Instead of relying on the security which the law gives, I stipulate for another security which I prefer. Accordingly, the taking of a mortgage upon the estate sold and conveyed has been considered as a waiver of the vendor's lien.

Manly vs. Slason, 21 Vt. 271;
Brown vs. Gilman, 4 Whea. 290;
Cole vs. Scott, 2 Wash. 141;
Pease vs. Kelley, 2 Oregon 417;
Little vs. Brown, 2 Leigh 353;
Camden vs. Vail, 23 Cal. 633;
Mattix vs. Weand, 19, Ind. 151;
Young vs. Wood, 11 B. Mon. 123;
Shelby vs. Perrin, 18 Tex. 515;
Hardley vs. Peckett, 25 Ind. 450;
Fish vs. Howland, 1 Paige 30;
Phillips vs. Saunderson, 1 Sm. & M. 465.

It remains to show, that while Chapman's taking the notes and mortgage upon the estate conveyed by him

clearly indicates an intention to waive his lien thereon as vendor, yet the circumstance that the mortgage was void, displaces the presumption, and notwithstanding the intention of the parties, preserves the lien. There is a manifest contradiction in saying in one breath, that in determining whether the vendor preserved his lien we are to inquire for the intention of the parties, and that taking a mortgage upon the estate indicates an intention to waive the lien, and in the next breath saying, that because, for a reason or fact unknown to the parties at the time, the mortgage is invalid, the lien is saved.

Hunt vs. Waterman, 12 Cal. 301;
Camden vs. Vail, 23 Cal. 633.

III. A third reason why this bill cannot be sustained is, that the debt, or the notes as evidence of the debt have been assigned to a third party by Chapman.

The bill alleges (Par. V. P. 3,) "that for a good and sufficient consideration by him then received of and from Charles A. Ely, Chapman sold, assigned, transferred and delivered to said Ely said notes and mortgage by common assignments endorsed thereon respectively." This is all we have in the bill on the subject of the assignment of the debt or the evidences thereof, or the implied lien of Chapman. Nor does the proof go farther. At Folio 50, Page 18, Chapman days: "Believing said *notes* to be good and valid and worth their face value, I sold, assigned and transferred and delivered them to Charles A. Ely for a valuable consideration." And this is all the evidence we have on the subject. Thus it appears that it is alleged and proved

that all of Chapman's interest in the debt, the evidence thereof, the security therefor, and the lien here claimed is gone from him, and nothing can be claimed by him.

It also appears that there was no transfer to the other plaintiffs of the vendor's lien, unless the assignment of the notes operated their transfer. The question is not simply, whether a vendor may assign his lien, but coupled with that is the further question, whether a transfer of the notes has that effect.

Upon the first of these questions the authorities are divided, but their decided weight is in favor of the negative of the proposition.

Williams vs. Young, 21 Ib. 227;
Ross vs. Heintzen, 36 Cal. 313;
Webb vs. Robinson. 14 Geo. 216;
Wellborn vs. Williams 9 Geo. 86;
Keith vs. Horner, 32 Ill. 524;
Carpenter vs. Mitchell, 54 Ill. 126;
Richards vs. Lieming, 27 Ill. 431;
Moshier vs. Meek, 80 Ill. 79;
Dixon vs. Dixon, 1 Md. Ch. Dec. 220;
Inglehart vs. Armiger, 1 Bland Ch. 519;
Pitts vs. Parker, 44 Miss. 247;
Skaggs vs. Nelson, 25 Miss. 89;
Briggs vs. Hill, 6 How. (Miss.) 362;
Walker vs. Williams, 30 Miss. 165;
Stratton vs. Gold, 40 Ib. 778;
Lindsey vs. Bates, 42 Miss. 397;
Adams v. Cowherd, 30 Mo. 458;
White vs. Williams, 1 Paige, N. Y, 502;
Smith vs. Smith, 9 Abb. Pr. N. S. 420;
Brush vs. Kinsley, 14 Ohio, 20;

Horton vs. Horner, Ib. 437;
Jackman vs. Hallock, 1 Ohio 318;
Tiernan vs. Beam, 2 Ib. 383;
Tharpe vs. Dunlap, 4 Heisk. 674;
Green vs. Demoss, 10 Humph. 371;
Norvell vs. Johnson, 5 Ib. 489;
Hecht vs. Sparks, 27 Ark. 229;
In Re Brooks, 2 Bank Reg. 466;
Marquat vs. Marquat, 7 How. N.Y. Pr. 417;
Stansell vs. Roberts, 13 Ohio, 148;
Wing vs. Goodman, 75 Ill. 159;
McLaurie vs. Thomas, 39 Ill. 291.

But however this may be, the cases are uniform that the mere transfer of the debt or evidence of it does not operate an assignment of the lien.

Baum vs. Grigsby, 21 Cal. 173;
Halleck vs. Smith, 3 Barb. 272;
Pitts vs. Parker, 44 Miss. 247;
Smith vs. Smith, 9 Abb. Pr. N. S. 420;
Jackman vs. Hallock, 1 Ohio, 318;
Tiernan vs. Beam, 2 Ohio 383;
Brush vs. Kinsley, 14 Ohio 20, 24;
Horton vs. Horner, 14 Ohio 437;
Claiborne vs. Crockett, 3 Yerger 27, 35;
Gann vs. Chester, 5 Yerger 205;
Sheratz vs. Nicodemus, 7 Yerger 9, 13;
Green vs. Demoss, 10 Humph. 371.

THIRD POINT.

THE BILL CONSIDERED AS ONE FOR RESCISSION.

It is insisted that relief may be awarded under this bill considered as one for rescission of the contract, and to compel a reconveyance. But no case for such relief has been made.

Admitting that rescission will be decreed where no fraud was practiced when the contract was made, yet there has been such a change of circumstances that that mode of relief would be most oppressive. This land purchased when the county was very sparsely settled, and situated very near to a town which has recently grown to great importance, must have greatly appreciated in value. Besides which fact there is the further one already adverted to, that the county has improved it to the extent of thirty thousand dollars.

Hough vs. Richardson, 3 Story, 659, 699.

FOURTH POINT.

THE BILL CONSIDERED ON OTHER GROUNDS URGED IN ITS SUPPORT.

If the bill cannot be maintained as one to enforce a vendor's lien, nor for rescission, it cannot be maintained on any other ground.

J. C. COWIN,
SOLICITOR FOR APPELLEE.

J. M. WOOLWORTH,
OF COUNSEL.

voucher for pay, a mere nominal, unsubstantial rank, conferred in a mode unknown to the constitution, by the selection of a general; but it is substantial rank, which, being conferred by appointment in accordance with the constitution, becomes a charter for precedence and command in the spheres of duty indicated in the law. But for conferring upon an officer one office in the line of the army and the lineal rank of another, no law nor reason can be found. The law knows no officer who holds one line office, without holding its rank, and, at the same time, holds the lineal rank of another line office, without holding the office itself; who is a lieutenant-colonel of the line without the rank of the office, and is, at the same time, a colonel in lineal rank, without holding the office to which such rank belongs.

There is an office of captain of cavalry. This office has the grade and generic rank of captain. The office of captain of artillery has the same grade and generic rank. Certain duties are prescribed by law and regulations for the office of captain of cavalry. Different duties are prescribed for the office of captain of artillery. A certain rate of pay is fixed by law for the office of captain of cavalry. The same rate of pay is fixed for the office of captain of artillery. Again, the titles of these two offices, though similar, are not identical. One office, therefore, may have the same rank and grade which another has, and the same pay, and yet have different duties and a different title. It is the rank, grade, pay, duties, and title together that constitute the office. The office is not an abstraction, to which the duties, pay, title, grade, and rank are attached, as mere extraneous appendages. It is a concrete thing, and it embraces, not as appendages, but as *integral parts*, the duties, grade, rank, pay, and title, and any other elements which the legislature may incorporate into the "sum and substance" of the office.

II.

The general and line offices in the retired branch of the army are equal in number to the corresponding offices in the active service. The generic offices of this branch of the army are twenty-two in number. But the grades are only ten and the ranks only ten. The retired captain of infantry and the retired captain of cavalry hold the same grade and generic rank; but they receive different rates of pay and have different titles.

If it were true that in the active service, where each office has, under the law, its own appropriate duties, as well as its name, grade, rank, and pay, an officer could hold one line office and the lineal rank of another, there would seem to be no reason for the transfer of this dual condition to the retired list. If an officer, in the active service, could hold the line office of captain and the lineal rank of colonel, it would not follow that a retired officer could be a captain of the line and at the same time hold the lineal rank of colonel. His office of captain would have no duties. He would not receive the pay of captain. He would not have the title of captain. He would not hold the rank or grade of captain. The proposition that an officer who has neither the duty, nor the name, nor the grade, nor the rank, nor the pay of captain holds the office of captain, seems to be manifestly illogical, as well as in conflict with the constitution and the law.

III.

All offices, whether in the active service or in the retired branch of the army, being created by congress, may be changed or abolished by congress. But no officer can be appointed or removed by act of congress.

It is competent for the legislature to change, at its discretion, any or all of the constituent elements of any of these offices. It may change either the duties, or the pay, or the grade or rank, or the title, or any or all of these

integral parts of the office. It may carry the changes so far as to destroy the identity, without actually terminating the existence, of the office. Or it may abolish the office in all its parts. It may change the pay, or the title, or the rank or grade of the office of retired colonel of the line, or of any other office in the retired branch of the army. It may prescribe and change, at pleasure, the permissible duties of such office. It may abolish any such office.

But it is not within the constitutional power of congress to appoint or remove officers of the army. This proposition is undisputed. It does not mean merely that congress cannot deprive an individual of an abstraction known as an office, and yet can deprive him of all the integral parts of the office. That would be a transparent, not to say puerile, attempt to evade the constitution. If congress can by statute deprive an individual of one of these constituent elements of his office, it can deprive him of two of them; and if of two, then of three, and of all. If it can remove him from so much of his office as consists of grade or rank, it can also remove him from so much as consists of title and duties; it can remove him from his entire office. If it cannot remove him from his entire office, it cannot remove him from so much as consists of grade or rank or of pay.

Offices created by law may be abolished by law, but individual officers cannot be deprived by congress of their offices, nor of the grade, rank, or pay which constitute integral parts of those offices. This rule is absolutely without exception. Congress may change or abolish the office, or may so change the qualifications as to necessitate dismissals by executive authority. But congress is powerless to remove an officer or to transfer an individual from one office in the army to another.

It is said by the court of claims that "congress has frequently exercised the power of changing the mere rank of officers without invoking the constitutional power of the

executive to appoint the incumbents to new offices." If this only means that congress has changed the rank of the offices themselves, it certainly indicates legislation which congress might constitutionally enact, whether it ever has or has not, in fact, enacted it. Indeed, it understates the power of congress. For congress may change not only the rank of an office, but also its name, pay, and duties. It may completely abolish the office. But to change the rank, or the pay, or the duties, not of the office, but only of certain incumbents, is another thing. If congress has ever attempted any legislation in that direction which purported to be anything more than a recommendation or permission to the appointing power to do this, such legislation, so far as it amounted to anything more than mere recommendation or permission to the executive, has been in conflict with those provisions of the constitution which provide for the appointment of officers of the United States.

How far congress can change the constituent elements of a particular office without abolishing the office, it may often be difficult practically to determine. But no such question arises in this case. The question here is not whether congress can abolish or change an office, nor whether the identity of the office can by destroyed without abolishing the office, nor how far the change may be carried before the identity of the office is destroyed. The question encountered in this case is, whether congress can take hold of three of the major-generals on the retired list and transform them into brigadier-generals.

If congress should enact that all wounded majors in the active service, excepting those wounded in a specified way, should "*be considered*" as captains, and should be borne on the army register and receive pay accordingly, then, so far as the constitutional questions involved are concerned, there would not have been the slightest shade of difference between such a statute and the statute of June 10, 1872, which reduced the appellant, except that the office in the

active service has duties, while the retired office of the appellant had none. But that difference would be immaterial. The law makes the position of the retired officer an office in the army. The appellant's office rested not on duty to be done but on duty already done,—duty of the highest quality which a soldier can perform for his country.

IV.

The word "rank" is used in the act of July 28, 1866, in a broader sense than in articles 4 and 5 of the army regulations. Retirement "upon the full rank of the command" held by the officer when wounded means retirement with the grade, pay, and title, as well as technical rank, of the office assigned by law to the command so held. If the officer, when wounded, held a command to which the office of major-general, including its grade, pay, title, duties, and technical rank, were assigned by law, he was retired with the pay, grade, title, and rank of major-general; that is to say, he was appointed to the office of major-general on the retired list of the army. Retirement on the rank of major-general in such case meant retirement with the pay, grade, and title, as well as technical rank, of major-general. If it did not mean all this, every payment made to the retired officer as major-general is made in violation of law, and his assignment to the grade of major-general on the army register, and designation by the title of major-general thereon, are without authority of law.

The word rank has precisely the same meaning in the provision for retirement made in section 1254 of the revised statutes now in force. Unless this provision, that "officers hereafter retired shall be retired upon the actual *rank* held by them at the date of retirement," secures to the retired officer an office, in the retired branch of the army, of the same rank, grade, pay, and title as that which he vacated in the active service, nothing secures to him that office, or the pay, grade, or title which it embraced. Unless

this word rank, as used in section 1254, covers the whole ground, the whole ground is uncovered.

In sections 1132, 1140, 1159, 1168, and 1200 of the revised statutes, the term rank is used in a narrower sense than in these acts relating to retirement, and yet in a broader sense than in articles 4 and 5 of the army regulations. These sections incorporate into 137 specific offices "the rank of captain of cavalry." For example, section 1200 incorporates into the office of the judge advocate "the rank of captain of cavalry." This provides for pay as well as for mere rank. It makes the judge advocate constructively a mounted officer. In this word "rank" only does he find his warrant for drawing from the treasury $2,000 per annum, the pay of a captain mounted, instead of $1,800 per annum, the pay of a captain not mounted. If the word "rank" did not, in these sections, secure the pay of captain of cavalry, its use would be absurd. For the mere rank of the captain of cavalry does not differ from the rank of a captain of infantry; and to confer the rank of captain of cavalry is merely to confer, by superfluous words, the rank of captain.

V.

The claimant, before and until his retirement, on the 9th day of June, 1868, was colonel of the second regiment of cavalry. Pursuant to the act of July 28, 1866, he was retired by the president upon the full rank of the command held by him in the volunteer service at the time when he was wounded. That was the rank of major-general. The president, by authority of law, transferred him, with his own consent, from the office of colonel of cavalry in the active service to the office of major-general on the retired list. By authority of law the president conferred upon a colonel of cavalry in the active service the office of major-general on the retired list, and this appointment was accepted.

The claimant did not, upon retirement, carry with him the office of colonel of the second cavalry which he had held. That office he left behind him; and, in accordance with the requirements of section 1257 of the revised statutes, it was filled by the promotion of the officer next in rank. The particular office of colonel of the second cavalry did not and could not have two incumbents at once, whether both were in the active service, or one in the active service and the other on the retired list. After his appointment to the office of major-general on the retired list he not only did not hold the office of colonel of the second cavalry in the active service, but he did not hold the office of colonel of cavalry at all, or any part or element of that office. The office which he held on retirement had, according to law, at that time only four constituent parts, namely, grade, rank, title, and pay. It had no duties. It had been shorn of its duties by section 1259 of the revised statutes. And yet it was an office, because section 1094 of the revised statutes declared the officer on the retired list a part of the army of the United States.

The rank of the office which he took, on the retired list, was that of major-general. Its pay was that of major-general. Its grade was that of major-general. Its title was that of major-general. The office was the office of major-general. He could not have held that office unless either appointed by the president by and with the advice and consent of the senate, or appointed pursuant to some statute by the president alone, or by a court of law, or by the head of a department. He was in fact appointed by the president alone. He was appointed by authority of law. This authority was conferred by the act of July 28, 1866, coupled with sections 1243, 1244, 1245, 1250, 1251, and 1252 of the revised statutes.

The office of the retired officer is not a mere prolongation of the office of the active officer, even when the retired officer acquires no higher grade, rank, pay, or title.

It is not provided that the attainment of a certain age, or of a certain period of official service, or any other event, shall, *ipso facto*, transfer the officer to the retired list. Substantive executive action is required by the law. And if it could be said that a retirement, without change of rank, grade, pay, or title, was not an appointment to a new office, but only a prolongation or continuation of an old office, it would not follow that a retirement, which included higher grade, rank, pay, and title, was no new appointment, but merely the continuation of an old office; it would not follow that a colonel of the line, having the rank of a colonel of the line, could be transformed, upon retirement, either into a major-general, or into a colonel of the line with the rank of major-general, by the mere prolongation or continuation of his former office, without any new appointment.

The suggestion of the attorney-general that retirement upon increased rank is not an appointment, because the duties which the president performs in the retirement of officers are regulated by law, is without force. It might as well be asserted that a promotion in the active service is not an appointment. Certainly the fact that the president is required to promote by seniority does not make the appointment of the promoted officer any less an appointment.

The law declares, and the court of claims concedes, that retired officers are officers of the army. Their appointment, therefore, must be made in the valid exercise of powers of appointment conferred by the constitution, or it will be void. There is no difficulty in reconciling the statute with the constitution. The appointment of a retired officer under the law is an appointment by the president alone.

It would have made no difference if the appellant, on his retirement, instead of being appointed, as he was, a major-general, had been appointed to the inconceivable office of colonel with the rank, pay, and title of major-general. An officer appointed by the president, in accord-

ance with the constitution and the law, a colonel, with the rank, pay, and title of major-general, if such an appointment were conceivable, would hold that rank, pay, and title as an integral part of his office, just as clearly as does an officer appointed a colonel, with the rank, pay, and title of colonel, hold that rank, pay, and title as a part of his office. It would not be competent for congress by legislation to reduce his rank or pay in one case more than in the other. Whether the office which the claimant held, upon his transfer to the retired list, was the office of major-general, or the inconceivable office of a colonel of the line with the rank, pay, and title of major-general, it was a new office. To that new office he was constitutionally appointed by the president. Nor was the new appointment a mere voucher for increased pay; it conferred a substantial office, and it was earned by the highest service which the soldier can perform. After he had been invested with that office, by the president, it was not possible for congress, by a legislative act, to transform him either from a major-general into a brigadier-general, or from a colonel with the rank, title, and pay of major-general into a colonel with the rank, title, and pay of brigadier-general.

VI.

But let it be conceded that the appellant was appointed a major-general retired, according to law, by the president, and that he could not be removed from the office by a mere act of Congress. Is it not, nevertheless, true that he was, according to law, afterwards appointed a brigadier-general retired, and accepted that appointment? If the act of 1875 could not have been effective, *per se*, to remove and reappoint him, was it not effective to authorize the president to appoint him to the office of brigadier-general retired? Did not the president appoint him to that office, pursuant to such authority? And did he not accept that office? I submit that each one of these questions must necessarily be answered in the negative.

The act of 1875 provides that, of seventy-three officers previously retired, "by reason of disability arising from wounds received in action," nineteen "*shall be considered* as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly." This statute provides for no new appointment by the president—for no new retirement—for no new executive action of any kind. It either, *per se*, transforms the offices already conferred into different and inferior offices, or it has no effect whatever. It purports to execute itself. And unless it does execute itself, by transforming the appellant's office of major-general retired into the office of brigadier-general retired, it amounts to nothing as a statutory enactment. It does not, in terms, or by implication, authorize the president to appoint him brigadier-general retired, or to restore him to the active service and then retire him as a brigadier-general. The only thing which it purports to authorize the president, or his subordinates, to do, is to cause his name to be transferred on the army register from the list of major-generals to the list of brigadier-generals, and to pay him as brigadier-general retired.

But the question whether this legislative authorization of such a transfer of the appellant's name, from the roll of major-generals retired to the roll of brigadier-generals retired, is a valid authorization, turns on the question whether the legislative transfer of the appellant, from the office of major-general retired to the office of brigadier-general retired, was valid. If he was, by this statute, effectually transformed from a major-general into a brigadier-general, then it was competent for congress to authorize the executive department so to enrol him on the army register. But if the attempted legislative transfer was unconstitutional and void, then any statutory provision requiring the president so to register him was nugatory. It was nugatory for

the same reason for which a legislative enactment requiring the president to enrol, on the army register, nineteen majors of infantry in the active service as captains would be nugatory. And an enrolment made in compliance with such an unconstitutional legislative requirement would be a nullity. An officer who is in law and in fact a major of infantry, in the active service, cannot by mere registration be transformed into a captain, any more than by mere legislation.

So, also, if the attempted legislative transformation of the appellant, from a major-general retired into a brigadier-general retired, was ineffectual, then the authority which the statute purported to confer for the reduction of his compensation to that of a brigadier-general retired was unconstitutional and void. For, as I have already shown, while it is competent for congress to abolish an office or the pay of an office, it is not competent for congress to remove an incumbent of an office, or, while maintaining unchanged the pay of the office, to reduce the pay of one of the incumbents of the office.

But, in the next place, the president has not appointed, or attempted to appoint, the appellant a brigadier-general. He has not even attempted to recall him to the active service and then retire him as a brigadier-general. By General Orders No. 33 "the retired list of the army, under the heading 'officers retired with the full rank of the command held by them when wounded,' * * * is amended to fix the rank of the following named officers from March 3, 1875, as below enumerated." This *amendment* of the army register presents the whole of the executive action in the premises.

It is true that the appellant has only received the pay of a brigadier-general retired since the enactment of the statute of March 3, 1875. But then he can not in this way be divested of his legal right to the pay which constitutes a part of his office, any more than to any other part

of it, or to the whole of it, any more than can two or three colonels of infantry in the active service be selected, out of twenty-five, and deprived of a part of their pay, while the pay of the office remains unchanged.

Finally, if the president be supposed to have attempted to confer the appointment of brigadier-general retired upon the appellant, while he was a major-general retired, the appellant, nevertheless, has not accepted the appointment, but has persistently declined it. If it be supposed that the president has attempted to recall the appellant to the active service and then to retire him as a brigadier-general, nevertheless the appellant has not asked that, or consented to it, so as to make the president's action regular and valid under section 1253 of the revised statutes, which expressly forbids a retirement without a full and fair hearing before a retiring board.

Nor has the appellant accepted the pay of a brigadier-general retired in full satisfaction of his claim against the United States. The only finding of the court of claims on this subject is that: "Since March 3, 1875, claimant has only received the pay of a brigadier-general retired."

VII.

The following conclusions are stated in the opinion of the court:

The titles of the offices to which general and line officers of the army are appointed—general, lieutenant-general, major-general, brigadier-general, colonel of cavalry or infantry, lieutenant-colonel, major, captain, and lieutenant—are employed also as the designation of rank for both the line and the staff, and when no other rank is conferred upon general and line officers, the titles of their respective offices also express their rank.

Rank is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon any officer in order to fix his relative position with reference to other officers in matters of privileges, precedence, and sometimes of command, or by which to determine his pay and emoluments.

In the case of the aids of the general of the army, officers of the line have a rank assigned to them different from that of the title of their office.

Officers of the line are paid according to their rank, except in the case of chaplains.

The retirement of an officer, whether on the rank which he held in the active service, or on a higher or lower rank, is not an appointment to a new office; the only appointment which he ever receives is his appointment in the active service.

All officers on the retired list retain the offices which they held in the active service, whatever rank may be given to them on retirement.

Congress has the constitutional power to transfer an officer to the retired list, and to change his rank and pay at any time.

Congress has frequently exercised the power of changing the mere rank of officers, without invoking the constitutional power of the executive to appoint the incumbents to new offices.

An officer duly appointed to any grade on the active list may be retired by congress with a rank higher or lower than that which belongs to his office.

The claimant, having been a colonel in the line, his retirement, with the rank of major-general, did not confer upon him a new office, but he retained the office of colonel, and only acquired a new and higher rank by his retirement.

It was within the constitutional power of congress to change his rank at any time.

By the act of March 3, 1875, his rank was reduced from that of major-general to that of brigadier-general.

They involve the following propositions:

1. That each of the grades of the line has a different rank in each arm of the service.
2. That rank is not an integral part of an office in the army.
3. That in the active service an officer may, at the same time, hold one office in the line and the rank (not merely brevet, but lineal) of another line officer.
4. That an officer on the retired list may, at the same time, hold one line office and the (lineal) rank of another line office.
5. That in the case of the aids of the general of the army, officers of the line have a rank assigned to them different from that of their office.
6. That officers of the line are paid according to their rank, except in the case of chaplains.
7. That the retirement of an officer, whether on the rank which he held in the active service, or on a higher or lower rank, is not an appointment to a new office; the only appointment which he ever receives being his appointment in the active service.
8. That all officers on the retired list retain the offices which they held in the active service, whatever rank may be given to them on retirement.
9. That congress has the constitutional power to transfer an officer to the retired list, and to change his rank and pay at any time.
10. That congress has frequently exercised the power of changing the mere rank of officers, without invoking the constitutional power of the executive to appoint the incumbents to new offices.
11. That an officer duly appointed to any grade on the active list may be retired by congress with a rank higher or lower than that which belongs to his office.
12. That the claimant, having been a colonel in the line, his retirement, with the rank of major-general, did not confer upon him a new

office, but he retained the office of colonel, and only acquired a new and higher rank by his retirement.

13. That it was within the constitutional power of congress to change his rank at any time.

14. That the reduction of the claimant's rank, by act of congress, did not change his office.

15. That by the act of March 3, 1875, his rank was, in accordance with the constitution, reduced from that of major-general to that of brigadier-general.

The argument seems to be, in substance, that in the active service an officer may, at the same time, hold one office in the line and the rank (not merely brevet, but lineal) of another line office; that for the same reasons, an officer on the retired list may, at the same time, hold one line office and the (lineal) rank of another line office; that an officer, when retired upon rank higher than that of the office which he held in the active service, carries with him to the retired list the office which he held in the active service,—is not appointed to a new office, in the sense of the constitution, but merely acquires new rank; that the reduction of the rank of such retired officer, by act of congress, is constitutional, and does not change his office; that the claimant, when retired upon the rank of major-general, retained his office of colonel, and acquired not the office, but only the rank, of major-general on the retired list; and that the subsequent reduction of his rank, by act of congress, to that of brigadier-general, did not change his office, and was authorized by the constitution.

It is respectfully submitted that the court erred in every branch of this argument, and in all of the material propositions and conclusions in which it is set forth.

The error of most of these propositions and conclusions has already been incidentally demonstrated. The others are now to be considered.

1. The statement that, except in the case of chaplains, officers of the line are paid according to their rank, is erroneous. All cavalry and artillery captains receive higher pay than any infantry captains. But all cavalry and artil-

lery captains do not hold higher rank than any infantry captains. On the contrary, all cavalry and artillery captains hold lower rank than any infantry captain whose commission is earlier in date than theirs. All captains of infantry receive the same rate of pay. All captains of cavalry receive the same rate of pay. So do all captains of artillery. But captains of infantry, while they all hold the same generic rank of captain, do not all hold, as among themselves, the same specific rank. On the contrary, the two hundred and fifty captains of infantry whose rank is determined by the dates of their commissions all hold different rank. The lowest captain on the list must ascend two hundred and fifty rounds on the ladder of rank to reach the place of the highest.

It is provided in section 1096 of the revised statutes that,

> The general may select from the army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry.

It is the opinion of the court of claims that in the case of these aids, the rank of particular officers is increased by congress, and that if it can be increased in their case by congress, it can also be diminished in their case by congress, and for a like reason in other cases. But the office of these aids, if they hold no appointment beyond the selection of the general, is not an office in the sense of the constitution. No officer of the United States can be appointed either by congress or by the selection of the general. The general's aid, so appointed, is not an officer known to the constitution. His position is not an office known to the constitution. It is a mere detail. And the so-called rank which by statute is annexed to this detail during its existence, is not rank in the sense of articles 4 and 5 of the army regulations. If a captain of the line selected by a general as an aid, and thereby invested with this nominal rank of colonel, should attempt, by virtue of such

rank, to exercise any command, or assume any precedence over lieutenant-colonels or majors of the line, the attempt could not be sustained. The lieutenant-colonels and majors would say that they had been appointed in accordance with the constitution to offices higher in rank than the office of captain, that the aid was only a captain in the eye of the constitution, and that a legislative attempt either to make or to authorize the general to make a substantive change in the office of a particular captain by raising its rank above that of the office of lieutenant-colonel or major, without the aid of the appointing power, was unconstitutional and void. And this position of the lieutenant-colonels and majors would be impregnable.

If this statute had in terms provided that a captain, when selected as an aid by the general, without an appointment by the president or secretary of war, should be entitled to exercise command over lieutenant-colonels and majors, a different question would have been presented. The question would then have been the same that would arise if a statute should provide that the general of the army might place the lieutenant-general under the command of a second-lieutenant. But it is not material to enquire whether such legislation would or would not be valid. No such legislation appears in the appellant's case.

An increase of the pay of individual officers which is not an increase of the pay of the office, is a mere appropriation of money by congress, which may or may not be justifiable according to the circumstances of the case. The increase of pay granted to the captain who is selected as the general's aid without an appointment by the president, is not an addition to the pay of the grade of captain, but is a special appropriation to compensate the individual for special duties, which congress has the power, in its discretion, to make.

The case of the general's aids, then, is no exception to the rule that congress cannot, by legislation, increase or diminish the rank of a particular officer duly appointed by

the president under the constitution. The rank of such officer is, in all cases, a part of the office, entering into its very texture and substance. It is conferred with the office, and can only be increased or diminished by the appointing power, which cannot, in any case, be the legislature.

Certain statutes contain the phrase, "with the rank and pay of colonel (lieutenant-colonel, major, captain, lieutenant) of cavalry." Such language does not imply that these officers hold rank distinct from that of corresponding officers in other arms. It conveniently indicates, in the fewest words, both the rank and the pay assigned by law to certain officers in particular cases. The words "with the rank and pay of a colonel of cavalry," are equivalent to the words "with the rank of a colonel and the pay of a colonel of cavalry." And they are not unintelligible, because the rank of colonel of cavalry is the rank of colonel, just as is the rank of colonel of artillery, and that of colonel of infantry. Some statutory provisions contain such expressions as "with the rank of major of cavalry." But the rank of major of cavalry is not a distinct rank. The expression "rank of major of cavalry" means nothing more nor less than "rank of major."

VIII.

It is not true, as asserted by the attorney-general, that the Crawford act of March 3, 1875, worked a retroactive repeal of the act of July 28, 1866, so as to make the claimant either a brigadier-general on the retired list or nothing. The provision of section 32 of the act of July 28, 1866, is:

"That officers of the regular army, entitled to be retired on account of disabilty occasioned by wounds received in battle, may be retired upon the full rank of the command held by them in the regular or volunteer service at the time such wounds were received."

The provision of the act of June 10, 1872, is:

"That all officers of the United States army, who may hereafter be retired, shall be retired upon the actual rank held by them at the date of retirement; and the thirty-second section of the act to increase and fix the military peace establishment of the United States, *approved July* 28, 1866, *is hereby repealed.*"

The act of June 10, 1872, therefore, repealed the act of July 28, 1866,—not a part of that act merely, but the whole of it. The repeal of the act did not affect the office, rank, pay, or title of any officer who had been retired in accordance with its provisions. It only terminated the possibility of further retirements in pursuance thereof. The officers already retired retained their rank, and their pay was fixed by section 1274 of the Revised Statutes, in which it is provided that "officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

The passage of the act of June 10, 1872, left not a vestige of section 32 of the act of July 28, 1866, to be repealed by the Crawford act of March 3, 1875. If the latter act had any effect at all to change the condition of those who had been retired under the act of 1866, it had such effect, not as a repeal of that act, but as new substantive legislation, transferring them from one office to another.

HALBERT E. PAINE,
Counsel for Appellant.

OFFICE SUPREME COURT U. S.
FILED
APR 2 · 1883
JAMES H. McKENNEY, CLK
17-414

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THOMAS J. WOOD, APPELLANT,
v.
THE UNITED STATES. } No. 231.

BRIEF FOR THE UNITED STATES.

The claimant and appellant, being a colonel of cavalry in the line of the United States Army, on the active list, was on the 9th June, 1868, placed on the retired list by the President, with the full rank and pay of a major-general, under the thirty-second section of the act of 28th July, 1866 (14 Stats., 337), which provides—

> That officers of the Regular Army entitled to be retired on account of disability occasioned by wounds received in battle may be retired upon the full rank of the command held by them, whether in the Regular or Volunteer service, at the time such wounds were received.

Afterwards, by a statute passed the 3d March, 1875 (18 Stats., 512), Congress enacted that—

> All officers of the Army who have been heretofore retired by reason of disability arising from wounds received in action, shall

be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay thereafter accordingly.

The effect of this legislation was to reduce the claimant's rank on the retired list from that of major-general to that of brigadier-general, and the present suit is to recover the difference between the pay he receives under the reduced rank and that which he received as a major-general.

The case is so thoroughly discussed in the opinion of the Court of Claims, that further argument is deemed unnecessary.

It is submitted that the judgment must be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

O

17-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 189.

THE BANK OF ST. THOMAS, APPELLANT,

vs.

THE BRITISH BRIGANTINE "JULIA BLAKE," HER TACKLE, APPAREL, FURNITURE, CARGO, AND THE FREIGHT DUE THEREON, WILLIAM T. CUNNINGHAM, GRAHAM P. CUNNINGHAM, AND WINTHROP R. CUNNINGHAM, CLAIMANTS OF SAID CARGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 28, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 189.

THE BANK OF ST. THOMAS, APPELLANT,

vs.

THE BRITISH BRIGANTINE "JULIA BLAKE," HER TACKLE, APPAREL, FURNITURE, CARGO, AND THE FREIGHT DUE THEREON, WILLIAM T. CUNNINGHAM, GRAHAM P. CUNNINGHAM, AND WINTHROP R. CUNNINGHAM, CLAIMANTS OF SAID CARGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Stipulation for libellant's costs	1	1
Monition	3	1
Order of publication	5	2
Claim of vessel	6	3
Stipulation for claimant's costs	8	4
Claim of cargo	10	4
Stipulation for claimant's costs	11	5
Stipulation for value of cargo	13	6
Order for sale of vessel	15	7
Order for sale of copper and junk	17	7
Amended libel	18	8
Exhibit A (bottomry bond)	24	11
Amended answer of claimant of vessel	30	13
Amended answer of claimant of cargo	33	15
Opinion of Judge Choate	38	17
Final decree, United States district court	58	27
Notice of appeal to United States circuit court	60	28
Petition of appeal to United States circuit court	61	29
Bond on appeal to United States circuit court	65	30
Bill of exceptions	67	31
Hearing of cause in United States circuit court	67	31
Findings of fact and conclusions of law	70	33
Schedule A	79	36
Opinion of Judge Blatchford	85	39

	Original.	Print.
Conclusions of law submitted by libellants	92	42
Exceptions of libellants to conclusions of law filed by circuit judge	95	43
Final decree in United States circuit court	99	45
Consent as to bill of exceptions	106	46
Order thereon	108	47
Petition of appeal to United States Supreme Court	110	47
Bond on appeal to United States Supreme Court	118	50
Citation	123	52
Consent as to record	125	52
Clerk's certificate	126	52

1 District court of the United States for the southern district of New York.

Stipulation for libellant's costs, entered into pursuant to the rules and practice of this court.—Filed the 31st day of August, 1876.

Whereas a libel was filed in this court on the 31st day of August, in the year of our Lord one thousand eight hundred and seventy-six, by the Bank of St. Thomas against the British brigantine Julia Blake, her tackle, &c., and cargo and freight money, for the reasons and causes in the said libel mentioned, and praying that said brigantine, her cargo, and freight money may be condemned, &c., and the said libellant and Robert Gordon and Benjamin F. Butler, sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or its sureties execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, con-
2 ditioned that the libellant above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against it by this court, or, in case of appeal, by the appellate court.

THE BANK OF ST. THOMAS,
By B. F. BUTLER, *Agent.*
B. F. BUTLER.
ROBT. GORDON.

Taken and acknowledged this 31st day of August, 1876, before me.
EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Robert Gordon and Benjamin F. Butler, parties to the above stipulation, being duly sworn, doth each depose and say that he resides in the city of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ROBT. GORDON.
B. F. BUTLER.

Sworn to this 31st day of August, 1876, before me.
EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

3 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States for the southern district of New York, on the thirty-first day of August, in the year of our Lord one thousand eight hundred and seventy-six, by the Bank of Saint Thomas, against the brigantine Julia Blake, her

tackle, apparel, furniture, cargo, and freight, bottomry $13,224 gold, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said brigantine Julia Blake, or vessel, her tackle, &c., the cargo and freight, may be cited in general and special to answer the premises, and, all proceedings being had, that the said brigantine or vessel, her tackle, &c., and also her freight and cargo may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said brigantine or vessel, her tackle, &c., and her freight and cargo, and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court in and for the southern district of New York, on the 19th day of September, 1876, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same,
4 and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the honorable Samuel Blatchford, judge of the said court, at the city of New York, in the southern district of New York, this thirty-first day of August, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the one hundred and first.

GEO. F. BETTS, *Clerk.*

LORD, DAY & LORD,
Proctors for Libellant.

In obedience to the written monition, I attached the brigantine Julia Blake, her tackle, &c., and her cargo therein described, on the 31st day of August, 1876, and in obedience to the annexed order have given due notice to all persons claiming the same that this court will on the 19th day of September, instant (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof should no claim be interposed for the same.

Dated September 19th, 1876.

OLIVER FISKE,
U. S. Marshal.

5 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the honorable Samuel Blatchford, district judge.

THE BANK OF ST. THOMAS
vs.
THE BRIGANTINE JULIA BLAKE, HER TACKLE and cargo and freight. } 26400.

On motion of Lord, Day & Lord, proctors for the libellant, it is ordered

that the notice for all persons to appear and intervene for their interest in the above entitled cause be published by the marshal until the nineteenth day of September instant.

(Signed) SAM'L BLATCHFORD.

A true copy.

GEO. F. BETTS, *Clerk.*

6 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 6th day of September, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the honorable Samuel Blatchford, district judge.

THE BANK OF SAINT THOMAS
against
THE BRIGANTINE JULIA BLAKE, HER TACKLE, cargo, and freight.

And now Peter Blake, intervening as owner of the brigantine Julia Blake, and agent of owner of cargo, for the interest of himself in the said brigantine and of the owners of said cargo, Winthrop Cunningham & Sons, of Philadelphia, in the said brigantine and cargo, appears before the honorable court and makes claim to the said Julia Blake, &c., as the same are attached by the marshal, under process of this court, at the instance of the Bank of St. Thomas, and the said Peter Blake avers that he was in possession of the said Julia Blake and of said cargo at the time of the attachment thereof, and that he is the true and bona fide owner of the said Julia Blake, and that no other person is the owner thereof, and the said Peter Blake, the true and lawful bailee thereof and of said cargo, as owner of said Julia Blake; wherefore he prays to defend accord-
7 ingly, and that said Winthrop Cunningham & Sons are the true and bona fine owners of said cargo.

PETER BLAKE.

BUTLER, STILLMAN & HUBBARD,
Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Peter Blake, being duly sworn, deposes and says that he resides at Parsboro', Nova Scotia; that he is the sole owner of the said brigantine Julia Blake, above named, and is the agent of the owners of the cargo on board said Julia Blake, Winthrop Cunningham & Sons, and that this deponent is duly authorized to put in this claim in behalf of the owner of the said cargo, and that the said claim is true of the knowledge of this deponent, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

PETER BLAKE.

Sworn to and subscribed this 6th day of September, 1876, before me.

GEO. F. BETTS,
U. S. Commissioner.

8 District court of the United States for the southern district of New York.

Stipulation entered into pursuant to the rules and practice of this court.—Filed 23d day of October, 1876.

Whereas a libel was filed in this court on the 31st day of August, in the year of our Lord one thousand eight hundred and seventy-six, by the Bank of St. Thomas against the brigantine Julia Blake, her tackle, cargo, &c., for the reasons and causes in the said libel mentioned, and praying that process may issue against the said brigantine, her cargo, &c., and the parties hereto hereby consenting, and that in case of default or contumacy on the part of the claimant or his sureties execution for the sum of two hundred and fifty dollars may issue against their goods chattels, and lands;

And whereas, also, a claim has been filed in said cause by Peter Blake, owner of the said brigantine, her tackle, &c.:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all costs and ex-

9 penses which shall be awarded against him by the final decree of this court, or, upon appeal, by the appellate court.

CHARLES F. WREAKE.
THOS. E. STILLMAN.

Taken and acknowledged this 23d day of October, 1876, before me.

JOHN NOTMAN,
Notary Public, Kings Co., N. Y.,
Cert. in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles F. Wreake and Thomas E. Stillman, the parties to the above stipulation, being duly sworn, doth each depose and say that he resides in the city of Brooklyn, State of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

CHARLES F. WREAKE.
THOS. E. STILLMAN.

Sworn to this 23d day of October, 1876, before me.

JOHN NOTMAN,
Notary Public, Kings County, N. Y.,
Cert. in N. Y. Co.

Recorded the 23d day of October, 1876.

10 United States district court, southern district of New York.

THE BANK OF SAINT THOMAS, LIBELLANT,
against
THE BRIGANTINE JULIA BLAKE, HER CARGO, &c., Winthrop Cunningham, William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, claimants.

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The claim of Winthrop Cunningham, William T. Cunningham, Graham

P. Cunningham, and Winthrop R. Cunningham, of the city of Philadelphia, in the commonwealth of Pennsylvania, merchants, to the entire cargo of the brigantine Julia Blake, now in custody of the marshal of this district at the suit of the Bank of Saint Thomas, alleges as follows:

That they are the true and bona fide owners of said cargo, and that no other person is the owner thereof.

And thereupon the said claimants pray that this honorable court
11 will be pleased to decree a restitution of the same to them, and otherwise right and justice to administer in the premises.

Dated New York, September 18th, 1876.

WINTHROP CUNNINGHAM,
WILLIAM THEO. CUNNINGHAM,
WINTHROP R. CUNNINGHAM,
By GRAHAM P. CUNNINGHAM.
GRAHAM P. CUNNINGHAM.

Sworn to before me this 18th day of September, 1876, by Graham P. Cunningham.

[L. S.]

J. F. D. SOLIS,
Notary Public (262), *City and County of New York.*

Stipulation for claimants' costs.—Filed Sept. 19th, 1876.

U. S. district court, southern district of New York.

THE BANK OF ST. THOMAS, LIBELLANT,
against
THE BRIGANTINE JULIA BLAKE, HER CARGO, Winthrop Cunningham, William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, claimants.

Whereas a libel was filed in this court on the 31st day of August,
12 1876, by the Bank of Saint Thomas against the brigantine Julia Blake, her tackle, apparel, and furniture and cargo, for the reasons and causes in the said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of the libellant;

And whereas, also, a claim has been filed in said cause by Winthrop Cunningham, William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, and the said claimants, and George W. Hubbard, surety, the parties hereto hereby consenting that in case of default or contumacy on the part of these claimants or their surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimants aboved named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or, upon an appeal, by the appellate court.

GRAHAM P. CUNNINGHAM,
G. W. HUBBARD.

Taken and acknowledged this 18th day of September, 1876, before me.
J. F. D. SOLIS,
Notary Public (262), *City and County of New York.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Hubbard, of the city of Brooklyn, one of the parties to the above stipulation, being duly sworn, says that he resides at No.
13 1307 Pacific street, in the city of Brooklyn, in the eastern district of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

G. W. HUBBARD,

Sworn to this 18th day of September, 1876, before me.
[L. S.] J. F. D. SOLIS,
Notary Public (262) *City and County of New York.*

Recorded Sept. 19th, 1876.

District court of the United States for the southern district of New York.
In admiralty.

Stipulation for value, entered into pursuant to the rules and practice of this court.—Filed the 18th day of January, 1877.

Whereas libel was filed on the thirty-first day of August, in the year of our Lord one thousand eight hundred and seventy-six, by the Bank of Saint Thomas against the Brigantine Julia Blake, her tackle, cargo, and frieight, for the reasons and causes in the said libel mentioned; and whereas the said cargo of said brigantine has been attached and now is in the custody of the marshal, under the process issued
14 in pursuance of the prayer of said libel; and whereas it has been consented that said cargo be released from custody upon claimants thereof executing and filing a stipulation for value, in the sum of eighteen thousand dollars, gold coin of the United States (the claimants having heretofore, on the 19th September, 1876, filed due claim thereto, and executed a stipulation for claimants' costs, also filed), as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimants of said cargo or their sureties execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such that if the stipulators undersigned shall, at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to McDaniel, Lummis & Souther, esquires, proctors for the claimants of said cargo of said brigantine, abide by and pay the money awarded by the final decree, with interest thereon from date of said decree rendered by the court, or the appellate court, if any appeal intervene, then the stipulation to be void, otherwise to remain in full force and virtue.

W. CUNNINGHAM & SONS,
By GRAHAM PRICE CUNNINGHAM.

Taken and acknowledged this 18th day of January, 1877, before me.
GEO. F. BETTS,
U. S. Commissioner.

15 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court rooms, in the city of New York, on Friday, the twenty-second day of September, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the honorable Samuel Blatchford, district judge.

THE BANK OF ST. THOMAS
against
THE BRIGANTINE JULIA BLAKE, HER TACKLE, &c., cargo & freight.

This matter coming on to be heard on the motion of the libellants for an interlocutory decree for the sale of said vessel, and for the discharge of the cargo on board thereof, on the ground of said vessel being in custody, and exposed to great and increasing expenses for wharfage and other charges, and the hearing having been duly adjourned by the court, from Friday, the 15th day of September, instant, the day for which the said motion was duly noticed, until the present 22d day of September, instant:

Now, upon reading and filing the affidavit of George De Forest Lord, on which said motion was made, together with the original notice of motion, and upon hearing the said George De Forest Lord in support of said motion, and Thomas E. Stillman, esq., proctor for the claimant, Peter Blake, in opposition thereto, and Messrs. McDaniel, Lummis & Souther for claimants of the cargo, appearing in open court, but not opposing, and no other claim having been filed herein, and no other parties appearing to oppose the said motion:

16 It is hereby ordered, adjudged, and decreed that the said brigantine Julia Blake, her tackle, apparel, and furniture, be sold as perishable property, and on the ground of her being exposed to great and increasing expenses, which threaten seriously to impair the value of the property and prejudice the rights of the parties in interest, if the same should be continued pending the litigation herein; and that a writ of venditioni exponas issue forthwith to the marshal directing him to sell the said vessel, together with her tackle, apparel, and furniture, as now attached and in his custody, after due notice given according to law and the practice of this court, and that he bring into the registry of this court the gross proceeds of the sale so to be made as aforesaid, deducting only the fees of the auctioneer for the expenses of sale, there to abide the further order of this court.

And it is further ordered and adjudged that unless the claimants of said cargo shall, within three days from the date of this order, take measures for securing the entry and landing of the cargo of said brigantine, and its deposit in some convenient place, subject to the control and custody of the marshal under the process of this court in this proceeding, the said marshal shall take such measures as shall be necessary for the entry and landing of said cargo, and for its proper storage and custody pending this litigation, and subject to the further order of this court.

SAMUEL BLATCHFORD.

17 At a stated term of the district court of the United States for the southern district of New York, held at the court house, in the city of New York, the 30th day of October, 1876.

Present, Hon. Sam'l Blatchford, district judge.

THE BANK OF ST. THOMAS
ag'st
THE BRIGANTINE JULIA BLAKE, HER TACKLE, &c., and her cargo.

On reading and filing the affidavit of George De Forest Lord, whereby it appears that there is a quantity of copper and junk now in the possession of the marshal, which was not sold or delivered at the time of the sale of the vessel, which property is rapidly diminishing in value, by reason of expenses incurred in its storage and custody: Now, on motion of Lord, Day & Lord, proctors for the libellants, due notice of this motion having been given to the proctors for the vessel and cargo, and no opposition being made by them, it is ordered that the said copper and junk, now in the possession of the marshal, be sold by him, according to the rules and practice of this court, in cases of perishable property (the clerk to issue the writ of venditioni exponas therefor), and that the proceeds of such sales be paid into the registry of the court, to await the further orders thereof.

SAM'L BLATCHFORD.

18 *Amended libel.*

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The amended libel of the Bank of St. Thomas, a corporation duly incorporated under and in pursuance of the laws of the Kingdom of Great Britain, and transacting business at the island of St. Thomas, West Indies, against the British brigantine Julia Blake, her tackle, apparel, and furniture, and her cargo and the freight due thereon, and against all persons lawfully intervening for their interest therein, in a cause of bottomry, civil and maritime, alleges as follows:

First. That the said brigantine Julia Blake, whereof Abram Knowlton now is or lately was master, while on a voyage from Rio de Janeiro, bound to New York, during the month of May last past, became so injured through stress of weather and perils of the seas that she was compelled to put into the said port of St. Thomas, as a harbor of refuge, for a general equipment and refit, and to procure repairs and supplies and necessaries to enable her to prosecute and perform her then intended voyage to New York.

That shortly after the arrival of said vessel at St. Thomas aforesaid, the said Abram Knowlton, as master of said brigantine, applied to the British consul resident at said port for a survey of said vessel, for the purpose of ascertaining her condition and the character and extent of the repairs and supplies which she would require; that two or more such surveys
19 were ordered by the said consul, and surveyors were appointed by him, who made two or more reports in writing, specifying the nature and extent of the repairs and supplies which were necessary under the circumstances; and that the repairs and supplies so recommended were thereupon made and procured by the master, and in connection therewith, and also under the recommendation of the surveyors so appointed as aforesaid, the cargo of said brigantine was discharged and stored until the repairs were completed.

And these libellants further allege that after the said repairs were made, and the supplies furnished, and after the other expenses connected with the discharge, custody, and reloading of the cargo had been incurred, they, the said plaintiffs, in answer to certain public applications for a loan upon bottomry and respondentia to pay the cost of the same, offered to the master of said brigantine to make such loan upon certain terms, which were accepted by him, including a maritime premium of fourteen per cent. (14%), and that the plaintiffs thereupon, upon the faith of the surveys above referred to, and upon presentation of the bills, duly approved by the master, loaned and advanced to him the sum of eleven thousand six hundred dollars in gold coin, on the hazard and adventure of the said vessel and of her cargo on her then intended voyage to New York, and in consideration of and as security for the said loan the said master duly executed a certain instrument of bottomry and respondentia, bearing date at St. Thomas on the 5th day of August, 1876, wherein and whereby, for the further and better security of the full payment of the said sum of eleven thousand six hundred dollars, American gold coin, together with the maritime interest or premium, at the rate of fourteen per cent., aforesaid, amounting to one thousand six hundred and twenty-four dollars
20 ($1,624) American gold coin, making in all the sum of thirteen thousand two hundred and twenty-four dollars ($13,224) American gold coin, as aforesaid, the said master did hypothecate and assign over unto the libellants herein the said brigantine Julia Blake, her tackle, apparel, and furniture, and also her freight and cargo then on board, and consisting chiefly of some 582 logs of rosewood, and the freight due thereon.

And it was also, in and by the condition of the said bond or instrument of hypothecation, provided that if the said Abram Knowlton, master as aforesaid, his heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto the said libellants, or to their attorneys, executors, administrators, or assigns, the full and just sum of thirteen thousand two hundred and twenty-four dollars ($13,224) American gold coin, aforesaid, at or before the expiration of five days after the arrival of the said brigantine at anchorage in the port of New York, then the said bond or instrument of hypothecation should be void and of no effect, otherwise to remain in full force and virtue, and the assignee or assignees of said bond were empowered to dispose of the said brigantine at public auction or otherwise, and also a part or the whole of the cargo then on board, as aforesaid, at public auction, or in such manner as the said holders of the said bond should deem best, in order to liquidate and defray the amount due thereon, as aforesaid, together with the charges, costs, and interest, as ruling at the said port of discharge of New York.

All of which matters will more fully appear in and by the said bond or instrument of hypothecation, a copy of which is annexed to this amended libel and forms part thereof.

21 Second. The libellants further allege, on information and belief, that the repairs so made, and the supplies so furnished, and the expenses so incurred in the discharge, custody, and reloading of the said cargo were necessarily incurred by the said master in order to enable him to prosecute his said voyage, and that the said master was a stranger in the port of St. Thomas, and was without funds or credit in said port, and that he could not raise any funds there upon the credit of the owners of

his said vessel, and that it would have been impossible for him to have procured the necessary repairs and supplies, or to have provided for the expenses necessarily incurred in relation to the said cargo, except by means of a bond of bottomry and respondentia such as that which is above set forth.

Third. The libellants further allege that at the time when the said sum of eleven thousand six hundred dollars was advanced by them as aforesaid, the said brigantine and her cargo were, according to the laws existing at the time in St. Thomas aforesaid, subject to liens to that amount for the repairs which had been so made, and the supplies which had been so furnished, and the expenses upon the said cargo which had been so incurred as aforesaid, and that by reason of said liens the said brigantine and her said cargo could have been condemned and sold by due process of law, and that it would have been impossible for either said brigantine or cargo to have left the said port of St. Thomas, or to have proceeded upon her said voyage, unless some person had made the loan and advance of eleven thousand six hundred dollars which was made by these libellants as above set forth, for the payment and discharge of the liens above referred to.

22 Fourth. And the libellants further allege that after the making of the said loan and the execution of the bond or instrument of hypothecation above set forth, the said brigantine sailed from St. Thomas and safely completed her said voyage to New York, at which port she arrived and came to anchor on or before the 25th day of August, 1876; and that the amount named in said bond, to wit, the sum of thirteen thousand two hundred and twenty-four dollars ($13,224) American gold coin, became due, according to the terms thereof, on the 30th day of August, 1876, but that, although thereto often requested before the commencement of this action, the said master has not paid the same, nor any part thereof, and the said amount, with interest thereon at the rate of seven per cent. per annum from the said 30th day of August, 1876, still remains wholly due and owing to the libellants.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellants pray that process in due form of law, according to the course of this honorable court in cases of admiralty and marine jurisdiction, may issue against the said brigantine Julia Blake, her tackle, apparel, and furniture, and her freight and cargo, and that all persons having or pretending to have any right, title, or interest therein may be cited to appear and answer to all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the

23 amount so due, with interest and costs, and that the said brigantine, her tackle, apparel, and furniture, and freight, and cargo may be condemned to pay the same, and that the libellants may have such other and further relief as in law and justice they may be entitled to receive.

MAITLAND, PHELPS & CO.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

ROYAL RHELPS, being duly sworn, saith that he is one of the firm of Maitland, Phelps & Co., who are the agents and attorneys in this city of

the Bank of St. Thomas, the libellant herein; that the said libellant does business in St. Thomas, West Indies, and not within this district; that deponent has read the foregoing libel and knows the contents thereof, and that the same is true to the best of deponent's knowledge, information, and belief.

ROYAL PHELPS.

Sworn to before me this 8th day of November, 1876.

JOHN LINDLEY,
Notary Public, City and County of New York.

24 EXHIBIT A.

Bottomry and respondentia bond.

Principal	$11,600,	American gold coin.
Maritime premium	1,624,	"
	$13,224	"

Know all men by these presents that I, Abram Knowlton, master of the British brigantine or vessel called the Julia Blake, of Parsboro', N. S., at present lying at anchor in this harbor of St. Thomas, and bound to New York, am held and firmly bound unto the Bank of St. Thomas, of
25 this place, in the penal sum of thirteen thousand two hundred and twenty-four dollars, American gold coin, to be paid to the said Bank of St. Thomas, its certain attorneys, executors, and administrators or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, and also the said brigantine or vessel called the Julia Blake, her tackle, apparel, and furniture, her freight and also her cargo, consisting of 582, say five hundred and eighty-two, logs rosewood, firmly by these presents. Sealed with my seal at St. Thomas, this fifth day of August, one thousand eight hundred and seventy-six.

ABRAM KNOWLTON. [L. S.]

Witnesses:
J. C. LORENTZEN.
A. R. HASSELL.

Whereas the said brigantine or vessel called the Julia Blake, of Parsboro', N. S., is lately arrived at this port in distress, disabled with loss of spars, sails, rigging, and in a damaged and leaky condition, caused and sustained on the voyage from Rio de Janeiro, bound to New York, compelling her to make for a port of refuge for general equipment and refit, as described and detailed in reports of survey and protest, noted before the competent authority at Saint Thomas, and which damages have been faithfully repaired and made good here, rendering the said brigantine Julia Blake seaworthy for the prosecution of the voyage hence to New York;

And whereas, by this unforeseen and unprovided necessity, Abram Knowlton, the master, had and has not funds for defraying the expenses incurred by the brigantine Julia Blake, in necessary repairs and outfits to the said vessel and outlays for landing, storing, and reshipment of the cargo, and has not been able to raise money on the credit of the owners of the vessel, the

said Abram Knowlton, in order to be enabled to pay for the neces-
26 sary and lawful disbursements and expenses, and to enable him to proceed to sea with the said vessel and her cargo on the said intended voyage, has been obliged to take up and borrow from the Bank of St. Thomas the sum of eleven thousand six hundred dollars, American gold coin, in cash; and whereas the said brigantine Julia Blake, being now ready for sea, to leave this port as soon as wind and weather serve after the execution of these presents, the said Bank of St. Thomas have accordingly, on the hazard and adventure of the said vessel and cargo on the said intended voyage, lent and advanced the said sum of eleven thousand six hundred dollars, American gold coin, which said sum is to be and to remain as a lien and bottomry and respondentia on the said brigantine Julia Blake, her tackle, apparel, and appurtenances, and her cargo of 582, say five hundred and eighty-two, logs rosewood and freight due thereon, at the rate and maritime premium of fourteen per cent., making the further and total sum of $13,224, say thirteen thousand two hundred and twenty-four dollars, American gold coin, the whole of which, exclusive of the bottomry maritime premium, has been necessarily expended on and about the repairs, and for the use and benefit of the said brigantine Julia Blake and cargo, to enable the continuance and prosecution of the voyage hence to New York.

In consideration of the maritime premium herein stipulated, the usual risks of the seas, rivers, enemies, and fire, on the said intended voyage, are to be for account of the said Bank of St. Thomas; and for the further and better security of the full payment of the sum of $11,600, say eleven thousand six hundred dollars, American gold coin, and the maritime premium of one thousand six hundred and twenty-four dollars, American gold coin, making together the full and total sum of thirteen thousand two hundred and twenty-four dollars, American gold coin, the said Abram
27 Knowlton, the master, doth by these presents, hypothecate and assign over to the Bank of St. Thomas, its executors, administrators, and assigns, the said brigantine Julia Blake, her tackle, apparel, furniture, freight, and the cargo now on board before specified and it is hereby declared that the said brigantine Julia Blake, her cargo and freight due thereon, is thus hypothecated and assigned over for the security of the aforesaid money, and shall be delivered to no other use or purpose whatever until payment of this bond is first made, with the premium due thereon.

Now the condition of this obligation and bond is such that if the above bounded Abram Knowlton, his heirs, executors, and administrators, do and shall well and truly pay, or cause to be paid, unto the said Bank of St. Thomas, its certain attorneys, executors, administrators, or assigns, the full and just sum of thirteen thousand two hundred and twenty-four dollars, American gold coin, being the sum borrowed, with the maritime premium aforesaid added thereto, at or before the expiration of five days after the arrival of the said brigantine Julia Blake at the anchorage of New York, then this obligation is to be void and of no effect.

If, however, the said amount, together with the maritime premium, is not paid within five days, as above specified, then this obligation and hypothecation is to remain in full force and virtue, and the assignee or assignees hereof is or are hereby empowered and authorized to dispose of the said brigantine Julia Blake, of Parsboro', N. S., at public auction or otherwise, and also a part of the whole of the cargo on board, at public auction,

or in such a manner as the holders of the bond deem best, in order to liquidate and defray the amount of thirteen thousand two hundred and twenty-four dollars, American gold coin, and also all charges, costs, and interest ruling at the said port of discharge at New York where
28 this obligation is payable, and to refund to the owners or representatives of vessel or cargo legally authorized any surplus thereafter.

Signed, sealed, and executed under my hand in duplicate, both of the same tenor and date, one of which being accomplished, the other to be void and of no effect, at St. Thomas, this fifth day of August, one thousand eight hundred and seventy-six.

ABRAM KNOWLTON. [L. S.]

Signed, sealed, and delivered in the presence of—
J. C. LORENTZEN.
A. R. HASSELL.

I, the undersigned, do hereby certify that Abram Knowlton, master of the British brigantine Julia Blake, of Parsboro', N. S., the party to the aforesaid bottomry and respondentia bond, personally came before me and executed the said bond in my presence and in presence of the witnesses thereunto, and acknowledged the same to be his free act and deed, for the purposes therein mentioned.

S. LUCCHETTI,
Att'y for Consul.

BRITISH CONSULATE, ST. THOMAS, *5th August*, 1876.

UNITED STATES CONSULATE,
St. Thomas, 5 *Aug.*, 1876.

I, Conrad C. Simmons, v. consul of the United States of America at St. Thomas, do hereby certify that the signature of S. Luchetti at the foot of the paper hereto annexed is his true and genuine signature, and
29 that the said S. Lucchetti is personally known to me, and is the acting British consul at this port.

In testimony whereof I have hereunto set my hand and affixed the seal of the consulate the day and year above written.

[SEAL.] CONRAD C. SIMMONS,
U. S. V. Consul

Pay to the order of Messrs. Maitland, Phelps & Co., New York.
Bank of St. Thomas, St. Thomas, 5th Aug., 1876.

S. BARTHOLMEI LANGE,
President.
CHAS. STRANDGAARD,
Manager pro tem.
CARL JACOB, *Acc't.*

30 *Amended answer of claimant of vessel.*

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The answer of Peter Blake, claimant of the brigantine Julia Blake, her

tackle, apparel, and furniture, and her freight, intervening for himself and all others interested therein, and in the cargo of the said brigantine Julia Blake, of Parsboro', Nova Scotia, to the amended libel of the Bank of Saint Thomas, alleges as follows:

First. Claimant admits that the said brigantine Julia Blake, whereof one Abraham Knowlton is master, was, as alleged in the first article of said amended libel, compelled, through stress of weather, while on a voyage from Rio de Janeiro to the port of New York, to put into the port of Saint Thomas, as a harbor of refuge, to procure repairs and supplies, and necessaries to enable her to prosecute her then intended voyage.

As to the other allegations contained in the said first article of said amended libel, claimant has no personal knowledge, and therefore denies the same.

Second. Claimant, upon information and belief, denies each and every allegation in the second article of the said amended libel contained.

Third. Claimant denies each and every allegation contained in the third article of said amended libel.

Fourth. Claimant admits that the master of said brigantine has not paid the money referred to in the fourth article of said amended libel,
31 nor any part thereof, and denies each and every other allegation in said fourth article contained.

Fifth. Claimant denies each and every allegation in the fifth article of said amended libel contained.

Sixth. Claimant, further answering said amended libel, states that while the said brigantine was at Saint Thomas as aforesaid, certain repairs and supplies were furnished to her, which were necessary to enable her to complete her voyage to the port of New York, but that many repairs were made and much material was furnished, and much labor was done in and about the said vessel which was not necessary to that purpose, but were made and furnished to the said brigantine and her cargo greatly in excess of any actual need therefor; and that many charges, as for work done and material furnished to said brigantine and her cargo, were fictitious.

And further states that the fact that some of the said materials furnished, and a portion of the repairs made and the work done to said ship and cargo were not necessary to enable the said brigantine to complete her voyage, and the fact that many charges as aforesaid were fictitious were well known at the said port of Saint Thomas, and, as claimant believes, were well known to libellant.

Claimant avers that said facts could easily have been known by the said libellant, but that, as claimant is informed and believes, the libellants omitted to make or cause to be made any inquiry as to whether the materials furnished and the work done to and in and about the said brigantine and her cargo, and for which libellant claims to have made advances on the faith of the bottomry set forth in said libel, were necessary or not.

32 Claimant further avers that means of defraying all necessary expenses for repairs made and materials furnished to, and work done in and about, said brigantine and her cargo, could have been procured without resorting to bottomry, but that the master of said brigantine improperly neglected to avail of such means; and further states that the fact that such means existed, and that the said master improperly neglected to avail of them, could have been known to said libellants had they made proper inquiry.

But claimant avers, upon information and belief, that libellants declined to make any inquiry whatever in the premises.

Seventh. Claimant avers that said brigantine, at the time she was in Saint Thomas, as set forth in said amended libel, was under charter to the owners of her cargo, and that she had been consigned in the port of St. Thomas to the agents of said charterers, as was well known to the captain of the said brigantine; and that means of speedy communication with the owners of said brigantine, with her charterers, and with the owners of her cargo existed and were well known to said master and said libellants, and that although such means existed, said master did not communicate with said owners or charterers, or either of them, relating to the execution of said bottomry, and had no authority to execute the same, as was well known to said libellant.

And that the said bond having been executed without authority is void, as against the said brigantine and her cargo.

Wherefore claimant prays that he may be hence dismissed with his costs in this behalf most unjustly incurred.

BUTLER, STILLMAN & HUBBARD,
Claimant's Proctors.

33 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Thomas E. Stillman, being duly sworn, deposes and says that he is one of the proctors for claimant herein; that the said claimant resides in Parsboro', in the province of Nova Scotia, and is now absent from this district, and he is, as this deponent is informed and believes, in the said Parsboro', in the province of Nova Scotia; that the matters set forth in the foregoing answer are derived principally from information given by the said claimant, and from testimony already taken herein, and that the said matters stated in the said answer are true, to the knowledge, information, and belief of this deponent.

T. E. STILLMAN.

Sworn to this 8th day of December, 1876, before me.

ADRIAN H. JOLINE,
Notary Public, Kings Co., N. Y., Ct. of N. Y.

Amended answer of claimants of cargo.

To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The answer of W. Cunningham & Sons, claimants of the cargo of the brigantine Julia Blake, of Parsboro', Nova Scotia, to the amended libel of the Bank of Saint Thomas, alleges as follows.

34 First. Claimants admit that the said brigantine Julia Blake, whereof one Abram Knowlton is master, as alleged in the first article of said amended libel, was compelled, through stress of weather, while on a voyage from Rio de Janeiro to the port of New York, to put into the port of St. Thomas as a harbor of refuge, to procure repairs and supplies, and necessaries to enable her to prosecute her then intended voyage.

As to the other allegations contained in the said first article of said amended libel, claimants have no personal knowledge, and therefore deny.

Second. Claimants, upon information and belief, deny each and every allegation in the second artic*al* of said amended libel contained.

Third. Claimants deny each and every allegation contained in the third article of said amended libel.

Fourth. Claimants admit that the master of said brigantine has not paid the money referred to in the fourth article of said amended libel, nor any part thereof, and deny each and every other allegation in said fourth article contained.

Fifth. Claimants deny each and every allegation in the fifth article of said amended libel contained.

Sixth. Claimants, further answering said amended libel, state that while the said brigantine was at Saint Thomas as aforesaid, certain repairs and supplies were furnished to her, which were necessary to enable her to complete her voyage to the port of New York, but that many repairs were made and much material was furnished, and much labor was done in and about said vessel and her said cargo, which were not necessary to
35 that purpose, but were made and furnished to the said vessel and her cargo greatly in excess of any actual need therefor, and that many charges, as for work done and material furnished to said brigantine and her cargo, were ficticious.

And further state that the fact that some of the said materials furnished, and a portion of the repairs made and the work done to said ship and cargo were not necessary to enable the said brigantine to complete her voyage, and the fact that many charges as aforesaid were ficticious were well know' at the said port of Saint Thomas, and, as claimants believe, were well known to libellant herein.

Claimants aver that said facts could easily have been known by the said libellant, but that, as claimants are informed and believe, the libellant omitted to make, or cause to be made, any inquiry as to whether the materials furnished and work done to and in and about the said brigantine and her cargo, and for which libellant claims to have made advances on the faith of the bottomry set forth in said libel, were necessary or not.

Claimants further aver that means of defraying all necessary expenses for repairs made and materials furnished to, and work done in and about, said brigantine and her cargo, could have have been purchased without resorting to bottomry; but that the master of said brigantine improperly neglected to avail of such means; and further state that the fact that such means existed, and that the said master improperly neglected to avail of them, could have been known to said libellant had it made or caused to be made proper inquiry.

But claimants aver, upon information and belief, that libellant declined or neglected to make any inquiry whatever in the premises.

36 Seventh. Claimants aver that said brigantine, at the time she was in Saint Thomas, as set forth in said amended libel, was consigned to these claimants in the port of New York, as owner of her cargo, and that she had been consigned in the port of Saint Thomas to the agents of these claimants there, as was well known to the captain of said brigantine; and that means of speedy communication with the owners of said brigantine, and with these claimants as such owners of her cargo as aforesaid, as also with the charterer of said brigantine, and the shipper of her cargo existed and were well known to said master and said libellant, and that although

such means existed said master did not communicate with said owners of said brigantine, nor with these claimants, nor with either thereof, relating to the execution of said bottomry, and that said master had no authority or necessity for the execution of the same, as was well known to said libellant. And that the said bond having been executed without such authority or necessity therefor, is void as against the said brigantine and the said cargo.

Wherefore claimants pray that they may be herein dismissed with their costs in this behalf most unjustly incurred.

McDANIEL, LUMMIS & SOUTHER,
Proctors for Claimants of Cargo.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Graham P. Cunningham, being duly sworn, deposes and says that he is a member of the firm of W. Cunningham & Sons, claimants of the cargo in the above entitled action.

37 That he has heard read the foregoing answer, and knows the contents thereof, and that the matters therein stated are true to the knowledge, information, and belief of this deponent.

GRAHAM PRICE CUNNINGHAM.

Sworn to this 25th day of April, 1877, before me.

[L. S.] J. F. D. SOLIS,
Notary Public (262), *City and County of New York.*

38 *Opinion.*

U. S. district court, southern district of New York.

THE BANK OF ST. THOMAS
vs.
THE BRIGANTINE JULIA BLAKE, HER TACKLE, &c., her cargo, &c.

CHOATE, J.:

The brigantine Julia Blake, Abram Knowlton, master, left the port of Rio de Janeiro on or about the 31st day of March, 1876, bound for the port of New York, having on board a cargo consisting of 582 logs of rosewood. The bills of lading, three in number, were drawn to the order of the shipper, one James P. Mee, of Rio de Janeiro, for 253, 139, and 190 logs respectively.

The charter-party was dated March 16, 1876, said Mee was named therein, and the freight stipulated was the gross sum of £220, of which £110 was paid in advance, as appears by the master's receipt on the charter-party, dated March 31, 1876. The master, on sailing, received from Mee, the shipper of the cargo, a letter of instructions, by which he was directed to proceed to the port of New York, and there to consign his vessel

39 and cargo to Winthrop Cunningham & Sons, of Philadelphia, or their agents, and if compelled by stress of weather, or other accident, to put into port, to consign the vessel to certain persons named at several ports, among them to Lamb & Co., St. Thomas. The brigantine was a

British vessel, and her owner was one Peter Blake, of Parsboro', Nova Scotia. She proceeded safely on her voyage until the 3d or 4th day of May, 1876, when, with fair weather, and with only a nine or ten knot breeze, owing to the rottenness of the masts and rigging, as the libellants admit, her rigging parted and her masts fell, the mainmast being broken off at the saddle, about six feet from the deck, and the foremast at the head. She had also leaked considerably during the whole voyage. The master was not examined, and the only witnesses to the incidents of the voyage and the disaster which disabled the ship are two of the seamen. I should have some hesitation in accepting their account of the cause of the dismasting of the vessel, as they seem to be not very trustworthy witnesses, but that the learned counsel for the libellants, in support of the point that the repairs subsequently made at St. Thomas were necessary, concedes, and indeed insists that the disaster was caused by the rottenness of the ship when she left Rio de Janeiro. It must be assumed, therefore, as a conceded point in the case, that she was unseaworthy when she left that port. The effect of the accident was undoubtedly to make the further prosecution of the voyage imprudent, if not impossible, and the master very properly made for St. Thomas as a port of distress.

She arrived at St. Thomas on or about the 26th day of May. Upon the application of the master, the British consul appointed a survey, consisting of three persons, the harbor master, the principal shipwright in the place, and the master of a vessel in port. On the 30th of May
40 the surveyors reported the condition of the ship, the mainmast about six feet above the deck gone, with all attached to it, foremast gone at the head and everything attached to it, except the fore yard, jib-boom and gear belonging to it, bowsprit started in the knight-heads, head of capstan gone, upper works in bow started, tarpaulin from mainhatch partly washed away, rudder-head twisted, part of topgallant-rail on port side spilt and part gone, the metal below the water bruised and torn off from spars and striking the bottom alongside at sea, and the ship leaking at the rate of twelve inches an hour in smooth water. The surveyors recommended the cargo to be discharged for further survey. It is insisted by the claimants that this survey is discredited by the testimony, especially by that of the two seamen, whose testimony goes to show, as it is claimed, that the sounding of the pumps was not fairly conducted; but in view of all the evidence in the case, including that which goes to discredit these two witnesses. I see no reason for withholding credit from the statements of this survey so far as it purports to state the condition of the ship from observation.

On one point, which is one of the contested points, the condition of her copper, the observation which the surveyors had opportunity of, was very limited, as the vessel lay in the water with her cargo on board. It is true that the two surveyors who were examined, the harbor master, and the shipwright, show a surprising forgetfulness as to the condition of the vessel, considering that they were examined within ten months after the survey, but their testimony affirms the correctness and fairness of the survey; and the third surveyor, a stranger in the port, was not examined as a witness.

41 The cargo was discharged in accordance with the report of the surveyors; and, upon the application of the master another survey

was called by the British consul on the 8th day of June; two of the surveyors, the harbor master and the shipwright were the same as before, and the third surveyor was another shipmaster in port. They reported that she was still leaking at the rate of twelve inches an hour; that on examining the top sides and poop-deck, they found the seams and butts slack from working at sea; and they recommended, in order to put the vessel in a seaworthy condition, new spars complete, except bowsprit and foreyard, new standing and running rigging, new suit of sails, hatchway tarpaulins, hawser to replace one cut at sea, boat to be repaired, topgallant-sail to be repaired, bow and bowsprit to be refastened, capstan-head to be replaced, rudder-head to be repaired, the vessel to be docked and stripped, as the metal had been much broken and torn away by the floating wreck, to be recaulked throughout, as required, and bottom to be remetalled.

The master, on his arrival at St. Thomas, instead of consigning his ship, as instructed, to Lamb & Co., went to several mercantile houses in the place and made inquiries, as if seeking a proper party to consign her to, and finally went to Lamb & Co., and engaged them to attend to the business of the ship, and the repairs, which were made in accordance with the surveys, were made under their supervision as agents of the vessel. The master told Lamb & Co. that he had lost his charter-party and letter of instructions. There is no other evidence that he had lost them, but he failed to produce them to Lamb & Co.

The master was not called as a witness, nor is his non-production
42 accounted for, and from the testimony I feel called upon to look upon any statement made by him as very questionable. Even if he had lost his charter-party and his letter of instructions, it is hardly credible that he should have forgotten to whom he was consigned at New York, and the fact that at St. Thomas he was consigned to Lamb & Co., yet he communicated neither of these facts to Lamb & Co., producing only to them the bills of lading which made the cargo deliverable to the order of the shipper, and gave no other clue to the consignee in the United States. Immediately on arrival at St. Thomas, the master wrote to Peter Blake, the owner of the vessel, at Parsboro', and subsequently Lamb & Co. and Blake corresponded on the subject of the disaster and the repairs; and this correspondence shows that the owner of the ship consented to the raising of funds by bottomry.

On the 1st of June, Lamb & Co. wrote a letter addressed to "The shipper of cargo ex Julia Blake at Rio," and sent the same by steamer to Rio de Janeiro, as follows:

"DEAR SIR: We have to advise that the brigantine Julia Blake put in here on the 27th ult., dismasted and leaking; a survey has been held, and for effecting repairs, &c., the cargo is being discharged. Capt. Knowlton tells us that he has cabled the casualty to the United States. As the cargo is consigned to order, we have been unable to acquaint the New York consignees of the misfortune."

It appears that the shipper of the cargo at Rio received this letter, although his reply was not produced; but on the 13th of July, he wrote to Lamb & Co., as appears by a letter of Lamb & Co., dated Septem-

43 ber 28th, 1876, sent to the same address at Rio, in which they say:

"Your favor of the 13th July last reached us recently via Porto Rico, and only after the Julia Blake had sailed from this port. The letter of instructions which you mention having given to Captain Knowlton on sailing from Rio, has never been laid before us, nor did he produce the charter-party, although we repeatedly asked for it. He alleged that it had been mislaid or lost at the time of the disaster at sea, and on being questioned, denied having any instructions from you as to the consignment of vessel in case of average. The bills of lading being 'to order,' left us no clue as to the consignees of cargo.

"The casualty was, however, at once cabled to the New York Board of Underwriters. While we regret that you should have any doubt as to our compliance with your wishes, it will now be clear to you how blameless we are in the matter. Whether Captain Knowlton purposely withheld information from us, or if he actually did lose the documents referred to, remain at present open for conjecture only; but the control intended to have been placed with us remained in part, at least, in hands of the captain as master of the vessel. We would suggest that you would advise us by mail of the despatch of all vessels conveying instructions from you to our firm in the event of their putting into this port in distress. We would thus, if necessary, be able at once to take up a position with the master, and then the protection of your interests at our hand can thus not be disputed or ignored. The adoption of such a course on your part is, we think, more advisable, under present circumstantial means of mail communication between Rio and St. Thomas.

"Capt. Knowlton was a disagreeable person, and incurred heavier expenses than we would have sanctioned had he consulted us. He
44 made accounts without our knowledge, and we only became aware of the large amount of expenses when the Julia Blake was actually ready for sea, on same being rendered to us with captain's signature on them for payment as consignees."

Although Lamb & Co. were examined as witnesses, and asked to produce all the correspondence with the shipper of the cargo, the letter of the shipper of the 13th of July was not produced nor its non-production accounted for, nor was any letter received by them or the master from the shipper produced on trial. This is all that appears in the case as to any correspondence with the shipper. From the contents of the letter of Lamb & Co., of Sept. 28th, it may be inferred that the shipper of the cargo received and replied to their letter of June 1st on the 13th of July, and that he complained that they had neglected his interests. The great delay in the receipt of his letter of the July 13th is not accounted for.

The shipper of the cargo, immediately upon receiving the bills of lading from the master, sent them, endorsed by himself, to Winthrop Cunningham & Sons, of Philadelphia, who were the owners of the cargo, except about 200 logs which belonged to Mee, the shipper at Rio.

They received the bills of lading, together with a copy of the letter of instructions to the master and a copy of the charter-party, before the arrival of the vessel at St. Thomas.

Cunningham & Sons received no communication whatever from the master or Lamb & Co., and had no information of the disaster or repairs to the ship till her arrival in New York, except that they saw in the news-

papers, about June 2d, a telegraphic item of news that the vessel had put into St. Thomas, dismasted and leaky.

45 During all the time that the vessel was in St. Thomas there was direct telegraphic communication between St. Thomas and New York, and there was also telegraphic communication between St. Thomas and Rio, by way of New York, London, Lisbon, and Pernambuco, from the time of the arrival of the vessel at St. Thomas till the 21st of July, when the telegraphic line between Bahia and Rio was broken, and the communication was not re-established until after the ship left St. Thomas.

Immediately after the second survey, which was made on the 8th of June, the repairs of the ship commenced. All the bills for the repair and disbursement of the vessel were paid by Lamb & Co. on being certified as correct by the master. The owners of the cargo contend that it is not proved that the repairs, to the extent to which they were made, were necessary. I think, however, the proof is complete that the vessel absolutely needed very extensive repairs, and that, too, of the nature of those which appear to have been made, except, perhaps, the remetalling. And it is also shown that it was necessary to discharge the cargo in order to repair her; but there is a noticeable failure in the libellant's proof as to most of the items included in the bill of expenses incurred by the ship. With trifling exceptions the material men and mechanics, who testified to the correctness of their bills, testify also to a total want of memory as to the actual condition of the vessel, and as to the necessity for the expenditure of the labor and materials furnished by them, and Lamb & Co., though they paid the bills, superintended the work in name only, and they testify that they have no knowledge or recollection as to the state of the vessel in detail or the necessity for the several items of expenditure; and, though twice examined as witnesses, they furnish no proof on this point. The

46 captain, who alone really superintended the work, was not a witness, and his certification of the bills is not, under the disclosures made by Lamb & Co. and the other evidence in the case as to his character, presumptive evidence of their correctness.

There is absolutely no witness who saw the ship out of the water who testifies to the condition of the metal, or the necessity for replacing it on the ship, and on this point the surveys are of little value. But this defect of proof, while under the circumstances it leads to a suspicion that the bill of expenses may have been to some extent fictit'ous, could be remedied by further testimony if necessary. The libel would not be dismissed, nor the items defectively proven rejected on that account, but a reference would be ordered, if necessary, to give the libellants an opportunity to supply the defect. (The Eureka, 2 Lowell, 423.) But for the purpose of disposing of the case, it will be assumed that repairs equal to or approximating the amount of the bills shown were necessary to render the vessel seaworthy. The whole amount of the repairs and outfit, including commissions and other expenses of Lamb & Co., was $11,600. The principal items were, discharging and reloading cargo, $594; storing cargo, $400; shipwright, $3,190.21; metal, 1,042.21; sailmaker, $1,215; iron work; $493.20; use of way, $259.20; riggers, $345; commissions and other charges of Lamb & Co., $1,123.41; ship chandlery, $1,725.34.

From this statement it will be seen, as might have been inferred from the descriptions of the injuries to the vessel in the surveys, that a very

large part of the expenses was incurred for the permanent repair of the vessel, and as such ultimately chargeable exclusively upon the ship in an adjustment as between ship and cargo.

47 On the 22nd of July, the repairs being then completed, the master advertised for proposals for a loan on bottomry and respondentia of the ship, freight, and cargo, to the amount of $7,500 or thereabout, to liquidate the expenses incurred in landing, storing, and reshipping the cargo, and to defray the cost of her repairs and outfit. The notice was extensively advertised, and the libellants, the Bank of St. Thomas, alone made a proposal; they offered to make the loan at a maritime interest of 14%. The offer was accepted, and a bond on ship, freight, and cargo executed therefor. The libellants made no inquiry whatever, except to satisfy themselves that the security offered was sufficient in amount for the loan. They paid over the money, $11,600, on the captain's order to Lamb & Co., who had paid the bills, and they received the bond. The vessel left St. Thomas on the 5th of August.

By the Danish law, in force in St. Thomas, material men and mechanics who supply a foreign ship. and a party advancing the funds to pay the same, can attach the vessel and cargo to satisfy their claims.

On the arrival of the ship in New York, payment of the bond was demanded and refused, and the Bank of St. Thomas libelled ship, freight, and cargo for the payment of the bond.

The ship was attached and sold by the marshal for about $4,500, and the proceeds, after paying wages of the crew and expenses of sale, have been paid into court. The amount in the registry from the sale of the ship is about $3,500. The total amount of the freight by the charter-party is £220.

The value of the cargo in New York is about $18,000.

48 The cargo was practically imperishable, not liable to decay or deterioration, except from long exposure to sea water.

Upon these facts, the principal question is whether the bond is void as against the cargo, for the reason that no sufficient communication was had with the owner of the cargo before the hypothecation of it was made.

It is considered that the amount of the repairs and expenses of the ship at St. Thomas cannot be brought below the value of ship and freight, and that sufficient notice was given to the owner of the ship, and therefore that the bond is valid as against ship and freight, but the owners of the cargo contend that the master was not, under the circumstances of this case, justified in pledging the cargo without communicating with its owner, and that the communication in fact had with the shipper at Rio was not sufficient, either as regards the character of the communication or the time when it was made, or as regards the person with whom it was had.

There are, in fact, two questions here; first, whether the master had the power to hypothecate the cargo for these repairs without communication with its owner; secondly, whether the libellants, as lenders, stand in any better position in this respect than the master.

Recent English decisions have certainly established the rule in that country that the master, before hypothecating the cargo for the repair of the ship, must communicate with the owner of the cargo, if such communication is practicable under the circumstances.

49 (The Bonaparte, 8 Moore's P. C., 459. The cargo ex Ham-

burgh, 2 Moore's P. C. (N. S.), 289. The Karnak, 37 L. J. Adm., 41. The Onward, 42 L. J. Adm., 61. The cargo ex Sultan, Swabey, 504. The Cassa Maratima, L. R. 2 App. Ca., 156.) It is clear that by these decisions, so far as the English courts of admiralty are concerned, the same rule that has long been applied as to the necessity of communication between the master and the owner of the ship, to justify a bottomry bond, is now applied as between the master and the owner of the cargo to justify a bond that binds the cargo. But it is claimed by the learned counsel for the libellants that this is distinctively an English rule and a new rule even in England; that it has never been adopted in this country; that it is difficult of application, and impracticable, and that it is not and ought not to become a rule of general maritime law. In one American case some doubt has been expressed as to whether these English cases truly represent the general maritime law. (The Eureka, 2 Lowell, 418.) That sometimes and under some circumstances the master has no authority to hypothecate the cargo without communicating with the owner, is certainly not a new doctrine in the English courts of admiralty. It was very plainly declared by Sir William Scott, in his very justly celebrated opinion in the Gratitudine (3 C. Rob., 259, 266). In that case the principle is laid down and enforced by argument and illustration that the master is not generally the agent of the owner of the cargo to dispose of or hypothecate it, but only to carry and deliver it according to the contract of affreightment, and that he becomes such agent to dispose of or hypothecate it only from the necessity of the particular case. From this it seems to result that if the owner is at hand in the same port, for instance, or easily reached, that there is not in the particular case any such necessity made out.
50 If this is so it must always be a subject of inquiry whether, under the circumstances of the particular case, the action of the master in hypothecating the cargo was justifiable and reasonably necessary.

It is not necessary in this case to determine whether, in the form in which this rule as to communication with the owner of the cargo has been stated by the English courts, or in the stringency of their rulings as to the character of the notice to be given, they have gone to a length which seriously and injuriously impairs the power of the master to raise money on ship and cargo in a foreign port, as the learned counsel for the libellant contends. The rule, as stated in the case of The Hamburg, and as very justly applied to the particular facts of that case, is certainly reasonable, and seems to be entirely in harmony with the case of the Gratitudine, thus: "If, according to the circumstances in which he is placed, it be reasonable that he should, if it be rational to expect that he may, obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

The supposed inconvenience of the rule is no greater than exists in all other cases where the authority of the master to act for the ship or cargo depends upon the particular circumstances of the particular case, of which there are so many familiar instances; like all similar rules, it is to be reasonably applied.

It is urged as a reason why such communication should not be required that the owner of the ship has the right to repair and to carry on
51 the cargo to its port of destination, if he elects to do so, instead of

transhipping the cargo; that, therefore, the owner of the cargo could, if notified, only save the maritime interest by furnishing the mone, himself; and so, it is further claimed, that if communication is necessaryy the want of it affects only the claim for maritime interest, and that for the principal sum loaned, with interest, the cargo is bound.

This argument rests upon the theory that the owner of the cargo cannot reclaim his goods at an intermediate port; that the ship has an absolute right to carry them to the end of the voyage, and so to earn her freight. But the right of the shipper, even in a case where nothing has happened to dissolve the contract, to demand his goods upon payment of full freight at an intermediate port, and an indemnity to the ship against loss and damages, seems hardly to be denied, even in the case cited in support of this proposition. (Parker v. Lorillard, 16 Johns, 335, per Chancellor Kent; see also the Onward, supra, p. 70.) The contract of affreightment, though a contract mutually binding, establishes the relation of principal and agent, of bailer and bailee, between the shipper and the ship; and, however such a contract might be dealt with by a common law court, it seems not according to the declared principles of equity upon which admiralty courts deal with questions that the shippers of goods should be denied the right to their possession while in the custody of his agent if he is willing to pay that agent all that he could possibly receive upon the full performance of the contract.

There may be cases where it would be equitable that the ship should receive more than the freight; as, for instance, if the redelivery of
52 the goods will impose an additional expense on the ship, as for ballast, or for the re-storing of cargo or the like (see The N. Hooper, 3 Sumn., 555). That the owners of the goods can reclaim them at an intermediate port, at least by payment of full freight, and on indemnifying the ship against all loss arising from their being so reclaimed, seems, therefore, to result from their ownership and the nature of the contract. Why, then, should he not have, equally with the owner of the ship, notice of extraordinary expenditures involving the cargo as well as the ship; and why should he not have, when the circumstances admit of it, an opportunity to exercise this option to reclaim his goods on fair terms? (On this point see 1 Parsons Shipping and Adm., 331 and notes.) But whatever may be the rule generally, in the present case the right of the owner of the cargo to reclaim his goods cannot be denied, for it is conceded that she sailed on the voyage in an unseaworthy condition, in violation of the warranty of seaworthiness contained in the charter-party. To deny his right to retake the goods under these circumstances would be the most manifest injustice. The argument, therefore, drawn from the supposed right of the ship to complete the voyage wholly fails as applied to this case.

Then, recurring to the particular circumstances of this case, we find the facts to be substantially as follows: The master had full notice that the consignee of the cargo was at Philadelphia. Even if it be true that he had lost his letter of instructions, of which there is not sufficient proof, it is not to be presumed, in the absence of evidence, that he had forgotten the name and address of the consignee to whom he was to deliver the cargo at the end of his voyage. He knew the name and address of the shipper at Rio de Janeiro. He knew, or must be presumed to have known, that the ship sailed on the voyage in an unseaworthy condition, as to her spars,

53 sails, rigging, and hull, and that she was in need of very extensive and permanent repairs. There is no evidence as to the value of the ship, except her sale in New York, at $4,500.

The master must be presumed to have known, not precisely, but approximately, her value, and very little inquiry as to the probable cost of repairs would have shown that they would far exceed the value of the ship—the cargo was imperishable and easily stored and preserved, and the port was one from which the owner could readily find means of transportation to the United States. There was telegraphic communication between St. Thomas and the United States at trifling cost. So also there was, up to the 21st of July, during which time, if ever, the master was bound to communicate, telegraphic connection with Rio, by which, through the shipper, the master could have obtained all necessary information for communicating with the owners of cargo, if he had forgotten who they were.

If, by his own negligence, he had lost the name and address of his consignee, then he was bound to use this means of recovering them, and the expense proved, of about $5.25 gold a word, seems to furnish no reason why this means of repairing the consequences of his own negligence should not be employed. But there is really no evidence to show that he did not know how to communicate directly with his consignee all the time.

Under these circumstances, to hold the master justified in hypothecating the cargo for the repairs of the ship without notice, would be contrary to the admitted principle which makes him only the agent of the owner of the cargo for that purpose in a case of necessity—for no such necessity exists where the owner is himself thus, by means of the telegraph or the mail, so close at hand.

54 Again, the master is bound, in acting as agent for ship and cargo, to consult, so far as he can, the true interests of both. He must not sacrifice the cargo to the ship. Now, here he acted in flagrant violation of the rights and interests of the owner of the cargo. Knowing the condition of the ship, he must be presumed to have known that it was not the interest, and would not be the wish, of the owner of the cargo to contribute a large part of the value of the cargo for the purpose of enabling the ship, which was disabled by its own unseaworthiness at the commencement of the voyage, and not by a peril of the sea, to be repaired in order to complete her voyage. His acts, as agent of the owner of the cargo, were not reasonably judicious, and, I am bound to say on all the evidence, were not done in good faith. (The Onward, ut supra, p. 70.)

The letter sent on the 1st of June by Lamb & Co. to Mee, at Rio, does not help the master's case. Assuming that it has the same effect as if written by him, it was sent by some roundabout way, so that it did not reach Mee till July 13. It did not convey any definite information as to the probable cost of the repairs, nor indicate that it would be necessary to hypothecate the cargo. Moreover, Mee was not the party with whom the master was bound to communicate, although he happened, so far as appears without the master's knowledge, to be the owner of a small part of the cargo. It must be held, therefore, that under the circumstances of this case the master was not justified by necessity in hypothecating the cargo. This case is strikingly like the case of The Hamburgh, cited above, with some added circumstances of recklessness, negligence, and bad faith, and many of the arguments of the learned counsel for

55 the libellants in this case, as to the impracticable character of the rule requiring communication, are met and fully disposed of in the opinion in that case.

The point taken that by the Danish law the cargo was already liable at St. Thomas, and that, therefore, the bond is good, is also clearly disposed of by that case and the other English cases cited.

That the libellants advanced their money in good faith is not questioned, but that they made no inquiries whatever, except as to the sufficiency of the ship, freight, and cargo to secure the amount of the bond is admitted.

A lender upon bottomry, who makes reasonable inquiries of the proper parties as to the facts which are essential to justify the master's action in hypothecating the ship, may have a good security, though misinformed as to the facts.

This is in the interest of commerce, and secures the masters of ships in distress in foreign ports reasonable means of obtaining funds to vessel and continue the voyage.

There is no reason why the same principle should not apply to the hypothecation of the cargo; but the validity of the bond, if upheld in such a case, depends wholly on the fact that the lender made such reasonable inquiry, and, as the result of it, obtained information which, if true, would sustain the action of the master. The interests of commerce do not require that the same protection should be extended to lenders who do not inquire, though they may lend their money in good faith, believing that the master had the necessary authority. Indeed, the interests of commerce are not aided, but impaired, by having such facilities for borrowing money within the reach of the master. If he makes no
56 inquiries the lender must stand or fall by the facts as to the master's authority. Making no inquiries, he must be presumed to know what the master knows. (On this point see The Hamburgh, ut supra, p. 324, and cases cited.) Maclachlan Merch. Shipping, p. 51.)

At the least the lender is charegable with notice of the facts that he could reasonably be expected to discover on inquiry, and in this case he certainly could have been expected to discover enough to satisfy him that no communication was had or attempted with the owner, though especially necessary under the particular circumstances.

In this case, therefore, there must be a decree in favor of the libellants against ship and freight, and in favor of the cargo against the libellants.

The old metal and junk taken from the ship at St. Thomas were brought in her to New York. They have been sold by the marshal, and the proceeds paid into court. It is claimed that they are part of the ship or cargo, and covered by the bond. These things had ceased to be part of the ship when the bond was given. They are the property of the owners of the ship, but in no sense a part of her, either actually or constructively, like the tackle, apparel and furniture, being adapted and designed for use upon her. The cargo described in the bond is 528 logs of rosewood. They are not within that description. This claim is disallowed. As to the amount of freight attached, it appears to be $450.12, gold. I do not see why the deduction of $185.50, for interest on the value of the cargo, should be deducted. The libellants are entitled to costs, against

57 the owner of the ship, and the claimants of the cargo against the libellants.

Decree accordingly.

August 16, 1878.

GEO. DE FORREST LORD,
For Libellants.

CHAS. E. SOUTHER, E. P. WHEELER,
For Claimants of Cargo.

THOS. E. STILLMAN,
For Claimants of Ship and Freight.

I hereby certify the foregoing to be a true copy of the decision rendered by Hon. Judge Choate, August 16, 1878, in the within entitled suit.

N. Y., August 21, 1878.

[L. S.] GEO. F. BETTS,
Clerk of the U. S. District Court for the Southern District of New York.

58 At a stated term of the district court of the United States for the southern district of New York, held at the court house, in the city of New York, on the 22nd day of August, A. D. 1878.

Present, Hon. William G. Choate, district judge.

THE BANK OF ST. THOMAS
against
THE BRIGANTINE JULIA BLAKE, HER TACKLE, apparel, and furniture, and her cargo, and the freight due thereon.

The cause having been heard upon the pleadings and proofs, and having been argued by the advocates for the respective parties, and due deliberation having been had, it is now—

Ordered, adjudged, and decreed by the court that the proceeds of the brigantine Julia Blake, her tackle, apparel, and furniture, now in the registry of this court, after paying the fees and expenses of the sale of the said brigantine, and the fees of the marshal and clerk in this cause, be paid to the proctors for the libellant, and that out of the same they retain their costs as against the claimants of said brigantine, and that the remainder thereof be applied as far as the same will go towards the payment of the bond in the libel mentioned.

59 And it is further ordered, adjudged, and decreed that William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, survivors of the firm of William Cunningham & Sons, claimants of the cargo of the said brigantine, pay to the proctors for the libellants the sum of four hundred and fifty dollars and twelve cents, gold coin of the United States, being the balance of the freight upon said cargo remaining in their hands at the time of the filing of the libel herein; from which they shall be entitled to deduct their costs as against the libellant, to be taxed, and which they may so retain out of said freight; and the amount aforesaid, to wit, the sum of four hundred and fifty dollars and twelve cents, shall be applied, as far as the same will go, to the payment of said bond.

And it is further ordered, adjudged, and decreed that the libel filed in the cause be dismissed as to the claimants of the cargo, with the costs to be taxed against the libellant, and that it be dismissed as to the proceeds of the copper and junk sold from the said brigantine, which proceeds are now in the registry of this court, and that the said proceeds be paid to the proctors for Peter Blake, claimant of said brigantine.

And it is further ordered that, upon said payment of said balance of freight, with costs deducted, unless an appeal be taken from this decree within the time limited and prescribed by the rules of this court, the stipulations made and entered into on behalf of the said W. Cunningham and Sons be cancelled, and that the bonds deposited by them with the New York Life Insurance and Trust Co., as additional security to the stipulation for value, be returned to them, or to their order.

WILLIAM G. CHOATE.

We hereby approve of the form of the foregoing decree.

(Signed) LORD, DAY & LORD,
Proctors for Libellants.
BUTLER, STILLMAN & HUBBARD,
Proctors for Claimants of Ship.

60 District court of the United States for the southern district of New York.

THE BANK OF ST. THOMAS, LIBELLANT,
ag'st
THE BRIGANTINE JULIA BLAKE, HER TACKLE, apparel, and furniture, and her cargo, and the freight due thereon; William T. Cunningham and o'rs, claimants of said cargo; Peter Blake, claimant of said brigantine, respondents.

GENTLEMAN: The libellant, in his action, appeals to the next circuit court from those portions of the final decree of the court in this cause which dismiss the said libel as against the claimants of said cargo, and the proceeds of copper and junk sold from said brigatine, and which awards costs to the claimants of said cargo as against the libellants.

Dated N. Y., Aug't 24, 1878.

Yours, &c.,

LORD, DAY & LORD,
Proctors, Libellants, Appellants.

To GEO. F. BETTS, Esq.,
Clerk U. S. Dis't C't.
Messrs. BUTLER, STILLMAN & HUBBARD, &
Messrs. MCDANIEL, LUMMIS & SOUTHER,
Proctors for Claimants & Appellants.

61 Circuit court of the United States, in the second circuit.

THE BANK OF ST. THOMAS, LIBELLANTS, APPELLANTS,
against
THE BRITISH BRIGANTINE JULIA BLAKE, HER tackle, apparel, furniture, cargo, and the freight due thereon; William T. Cunningham and others, claimants of said cargo; Peter Blake, claimant of said brigantine Julia Blake, claimants, appellees.

To the honorable circuit court of the United States, in the second circuit:

The appeal of the above named appellants respectfully showeth:

That on or about the 31st day of August, 1876, the above named libellants exhibited their libel in the district court of the United States for the southern district of New York against the above named brigantine, her tackle, apparel, furniture, cargo, and freight due thereon, claiming to recover the sum of thirteen thousand two hundred and twenty-four dollars, American gold coin, with interest thereon, at the rate of seven per cent. per annum, from the 30th day of August, 1876, on a certain bottomry and respondentia bond made and executed by Abram Knowlton, master of the said brigantine, to the said libellants at Saint Thomas, on the
62 5th day of August, 1876; and that thereupon the above named appellees filed their claim against said brigantine, her tackle, apparel, furniture, cargo, and freight, giving due stipulations for costs and value, and on the 19th day of September, 1876, the claimants of said vessel and cargo duly appeared.

That on the 15th day of November, 1876, the libellants duly filed their amended libel, claiming the same recovery as in said original libel, and that on or about the 9th day of December, 1876, the amended answers of the claimants of said brigantine and her cargo were also duly filed, praying that said libels might be dismissed with costs, as by reference to said libels and answers will more fully appear.

That on the 11th day of October, 1876, said brigantine was duly sold, under due process of said district court, for the sum of four thousand five hundred dollars, which amount, less certain sums which have been paid thereout by order of said district court, for prior admiralty liens, and which have reduced said amount to about the sum of three thousand five hundred dollars, is now in the registry of said court.

That, subsequently, certain copper and junk belonging to said vessel were, by an order of the said district court, duly made and entered on the 23d day of October, 1876, sold, and the proceeds of said sale are now also in the registry of said district court.

That the cargo of said brigantine, consisting of 582 logs of rosewood, was not sold, the claimants thereof having secured the claim of the libellant by a deposit of United States bonds, in conformity with an agreement made by them with the libellants' agents.

63 That the said cause came duly on to be heard before the Hon. William G. Choate, judge of the said district court, on the 14th, 15th, and 16th days of May, 1878, on the pleadings and proofs taken therein, and that on the 22d day of August, 1878, the said judge made a de-

cree directing that the proceeds of the sale of said brigantine, now in the registry of said district court, after paying the expenses of sale and the clerk's and marshal's fees, be paid to the proctors of the libellants, to be applied so far as the same would go to the payment of the libellants' costs and the amount in the libel mentioned; and further, that the claimants of the cargo of the said brigantine pay to the libellants the sum of four hundred and fifty dollars and twelve cents, gold coin of the United States, being the balance of the freight due on said cargo, and that, after deducting their costs, the said sum of four hundred and fifty dollars and twelve cents, so far as the same may go, to be also applied to the payment of said bond. And further directing that the libel be dismissed as to the cargo and the claimants thereof, with costs against the libellants, and also as to the proceeds of the copper and junk sold from said brigantine, now in the registry of said district court, and that said proceeds be paid to the claimants of said brigantine.

That said final decree was duly entered and filed in the office of the clerk of said district court on the 23d day of August, 1878.

That the appellants are advised that said decree is erroneous, in so far that the said libel should not have been dismissed as against said cargo, and the proceeds of said junk and copper sold as aforesaid, and that costs should not have been adjudged to the claimants of said cargo as against the libellants.

64 And the appellants, for these and other reasons, appeal to the next circuit court, to be held in said district, from such portions of said decree as dismiss said libel as against the cargo and the proceeds of said copper and junk so sold, and which award costs to the claimants of said cargo. And on the said appeal they intend to have the cause heard anew in the circuit court, on the pleadings and proofs in said district court, and on other allegations and proofs to be introduced in said circuit court; and they pray that the record in said district court may be returned to said circuit court, and that so much of said decree as dismisses said libel as against said cargo, and the proceeds of the copper and junk so sold, and which awards costs to the claimants of said cargo may be reversed, and that such decree thereupon may be made as to such circuit court may seem just, and that the appellees may be decreed to pay to the appellants their costs and damages in the premises.

LORD, DAY & LORD,
Proctors for Libellants, Appellants.

Dated New York, August 31st, 1878.

65 *Bonds for damages and costs on appeal.*

Know all men by these presents that we, The Bank of St. Thomas and Benjamin F. Butler, are held and firmly bound unto W. T. Cunningham and others, survivors of W. Cunningham & Sons and Peter Blake, in the sum of one thousand dollars, to be paid to the said W. T. Cunningham and others, survivors of W. Cunningham & Sons and Peter Blake, their executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the sixth day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the Bank of St. Thomas, as appellant, has appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from portions of a decree of the district court of the United States for the said southern district, bearing date the twenty-second day of August, 1878, in a suit in which the Bank of St. Thomas was libellant against the brigantine Julia Blake, her tackle, &c., and her freight and cargo, Peter Blake, claimant of said vessel, and W. Cunningham & Sons, survivors, &c., claimants of said cargo.

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute said appeal with effect and pay all damages and costs which shall be awarded against them as such appellants therein if they shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

66

BANK OF ST. THOMAS,
By MAITLAND, PHELPS & CO.,
Attorneys.

B. F. BUTLER.

Sealed and delivered and taken and acknowledged the sixth day of September, 1878, before me.

R. C. CURRAN.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Benjamin F. Butler, being duly sworn, doth depose and say that he resides in the southern district of New York, that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

B. F. BUTLER.

Sworn to this sixth day of September, A. D. 1878, before me.

R. C. CURRAN,
Notary Public, Kings and New York Counties.

This bond approved as to form and amount and sufficiency of surety. Dated New York, Sept. 7, 1878.

BUTLER, STILLMAN & HUBBARD,
For Claimants of Vessel.
McDANIEL, LUMMIS & SOUTHER,
Proctors for Claimants of Cargo.

67 Circuit court of the United States for the southern district of New York, in the second circuit.

THE BANK OF ST. THOMAS, LIBELLANT AND appellant,
against
THE BRITISH BRIGANTINE JULIA BLAKE, HER tackle, apparel, furniture, cargo, and the freight due thereon, Winthrop Cunningham, William T. Cunningham, and Graham P. Cunningham, being claimants of said cargo.

Bill of exceptions.

The above-entitled cause came on for trial in the city of New York, in

the southern district of New York, in the second circuit, before the honorable Samuel Blatchford, circuit judge, on the 4th day of March, 1879, on the appeal of the libellant above named from such portions of a certain final decree made and entered in said cause on the 23rd day of August, 1878, in the district court of the United States for the southern district of New York, as dismissed the libel filed by said libellant as against the cargo of said brigantine Julia Blake, and the proceeds of the sale of certain copper and junk taken from said brigantine, and which awarded costs to the claimants of said cargo against said libellant.

68 And thereupon the counsel for the libellant read the amended libel of the libellant, and the counsel for the claimant of said brigantine, and of the said proceeds of sale of said copper and junk, read the answer to said amended libel filed on his behalf, and the counsel for the claimant of said cargo and the freight due thereon read the answer to said amended libel filed in their behalf as the same are contained on the apostles or record of proceedings in said cause transmitted from the said district court to the said circuit court.

And the counsel for the libellant, to maintain the issues on its behalf, then read the depositions of Patrick Sullivan and Orestes R. Brackett, and also the depositions of I. C. Lorentzen, Abraham R. Hassel, Sosthenes Luchetti, C. Leigh, Joseph Daniel, James R. Bartaby, James Donald Lamb, William Charles Lamb, S. Bartolomei Lange, Edward Shön Peterson, Charles H. A. Strandgaard, James Durie, William Niles, J. T. McDougal, Edward Kuntz, Constant Gabriel Larchevent, Thomas Clark, I. W. Bache, Jules Valencia, Cornelius Stuart (Parrott), Charles De Castro, and M. R. Nyssum, taken upon interrogatories in a certain commission issued to the island of St. Thomas, and also the deposition of James Donald Lamb, taken upon interrogatories in a certain other commission so issued, the counsel for the libellants reading the direct examinations of the witnesses above named and the counsel for the claimants reading the cross-examinations; certain exhibits referred to in and annexed to said

69 interrogatories and depositions, being also duly read in evidence by the libellant's counsel.

And the counsel for the claimants, to maintain the issues on their behalf, read the depositions of Simon Ash, Patrick Sullivan, William Holmes, Graham P. Cunningham, and Bartholemew Cronin, counsel for the claimants reading the direct examinations of said witnesses, and counsel for the libellant reading their cross-examination, and the counsel for the claimants also read in evidence certain exhibits referred to in and annexed to the said depositions.

And the admission of counsel made and presented in the district court, as found in the apostles transmitted therefrom to said circuit court, to the effect that, pursuant to the order of said district court, the vessel had been sold for $4,500, and the copper and junk aforesaid for $223.94, and the proceeds paid into the registry of said district court, that certain preferred claims for wages had been paid, and that the balance in the registry was $3,537.60 was also read.

All the depositions hereinbefore mentioned were the same as were presented to the district court and as are found in said apostles.

And the counsel for the claimants also read, by consent, the depositions of Frank H. Dennis, Graham P. Cunningham, Frederick E. Strong, William Holmes, and George Roberts taken in said circuit court.

And then argument was made by the respective counsel on behalf of the libellant and on behalf of the claimants.

And thereafter and on the 16th day of July, 1879, said circuit judge, having taken time to deliberate, filed in the office of the clerk of
70 said circuit court the following findings of fact and conclusions of law, made and signed by him:

Circuit court of the United States for the southern district of New York.

THE BANK OF ST. THOMAS
vs.
THE BRITISH BRIGANTINE JULIA BLAKE.

In this case I find the following facts:

1. The brigantine Julia Blake, Abraham Knowlton, master, left the port of Rio de Janerio on or about the 31st day of March, 1876, bound for the port of New York, having on board a cargo consisting of 582 logs of rosewood. The bills of lading were three in number, and were drawn to the order of the shipper, James Philip Mee, of Rio de Janerio, for 253, 139, and 190 logs, respectively. Of this quantity about 200 logs belonged to the shipper Mee, but the claimants had made advances on them to Mee. The remaining belonged to the claimants herein.

2. The charter-party was dated March 16, 1876. Said Mee
71 was named therein as the charterer, and the freight stipulated was the gross sum of £220 sterling, £110 of which sum was paid in advance.

3. The master of the brigantine on sailing received from said Mee a letter of instructions, directing him to proceed to the port of New York and there consign his vessel and cargo to Winthrop Cunningham and Sons, Philadelphia, the claimants of the cargo herein, or their agents, and if compelled by stress of weather or other accident, to put into port, to consign the brigantine to persons named at various ports, and among them to Lamb & Co., at St. Thomas. The said brigantine was a British vessel, and was owned by Peter Blake, of Parsboro', Nova Scotia.

4. Said brigantine proceeded safely on her voyage until the 3rd or 4th day of May, 1876, on one of which days her rigging parted and her masts fell, the mainmast breaking at the saddle, about six feet from the deck, the foremast at the head. The fallen spars and wreck remained for some time alongside, and thumping, before they could be cleared away.

5. This accident made it imprudent to prosecute the voyage, and the master properly made for St. Thomas as a port of distress.

6. Said brigantine reached St. Thomas on the 27th day of May,
72 1876. The master applied to the acting British consul, and said consul appointed a survey, consisting of three persons, the harbor master, the principal shipwright in St. Thomas, and the master of a vessel in port.

7. Said surveyors made a report on the 30th of May, 1876, of which a copy is in evidence.

8. The pumps were carefully and fairly sounded upon such survey.

9. The metal of the vessel below the water was not visible, except in places, and there it was more or less bruised and torn off.

10. Said survey properly recommended a discharge of the cargo, and it was necessary to strip the vessel of her copper in order to stop the leaks.

11. In consequence of said report the cargo was discharged, and on the eighth day of June, 1876, a second survey was ordered by the consul upon application of the master.

The surveyors were the same as before, with the exception of the surveyor described as a shipmaster in port, who was replaced by another shipmaster in port.

A copy of the report of said second survey is in evidence.

73 12. The said brigantine made as much water at the time of the second survey as she did at the time of the first, namely, twelve inches per hour.

13. The surveyors examined the copper of the brigantine after the second survey as far as it was visible, and the statement in said survey that the metal had been "much broken and torn away and ragged" was fully warranted by the facts.

14. When the master arrived at St. Thomas he went to several mercantile houses in St. Thomas and seemed to be seeking a proper party to whom to consign said vessel, and finally went to Lamb & Co. and engaged them to attend to the business of the ship and the repairs. He did not show them his charter-party and letters of instructions, but told them he had lost the same.

15. Thereupon the correspondence of which copies are set forth in schedule A, hereto annexed, passed between the parties in interest.

16. During all the time that said brigantine was at St. Thomas there was facility for telegraphic communication between St. Thomas and New York.

17. There was telegraphic communication between St. Thomas
74 and Rio de Janeiro, by way of New York, London, Lisbon, and Pernambuco, from the time said brigantine arrived at St. Thomas till the 21st of July, 1876. On the last-mentioned day a break occurred in the cable between Bahia and Rio de Janeiro, but the Western Union Telegraph Company continued to transmit telegrams from New York to Bahia, and they were forwarded thence to Rio de Janeiro, the time required for transmission from New York to Rio de Janeiro being about five days.

18. The lines of telegraph aforesaid were often employed by merchants and men of business in St. Thomas, and that from St. Thomas to New York was known to and used by the claimants.

19. Immediately after the second survey the repairs on the ship commenced. The bills for the repairs and supplies to the vessel were paid by Lamb & Co., after being first certified as correct by the master. Some were paid to the master and some to the parties making the repairs and furnishing the supplies.

20. On the 22nd of July, 1876, the repairs were completed, and the master advertised for proposals for a loan on bottomry and respondentia of the ship, freight, and cargo to the amount of $7,500 or thereabouts. The notice was extensively advertised, and the libellant alone made a
75 proposal. This was to loan the amount at a maritime interest of 14 per cent. The offer was accepted. Copies of the advertisement and tender are in evidence.

21. Lamb & Co. made no inquiry as to the necessity of the repairs and supplies, but relied on the statement of the master.

22. The discharging of the cargo was necessary in order to stop the leaks and to make the vessel seaworthy for a voyage to New York.

23. The remetalling of the vessel was necessary to make her seaworthy for a voyage to New York.

24. The repairs and supplies furnished were necessary to make the vessel seaworthy for a voyage to New York.

25. The only inquiry made by the libellant was as to the sufficiency of the security in amount to satisfy the loan, and as to the regularity of the execution and attestation of the bottomry bond.

26. When the matter came to be closed the captain informed Lamb Co. that a large amount of expenses had been incurred of which they had no previous information, and that the amount required to defray the expenses and their commissions and charges was $11,600.

76 27. The libellants paid over the money, $11,600, on the captain's order, to Lamb & Co., and received the bond. The vessel left St. Thomas on August 5, 1876. On her arrival in New York payment of the bond above mentioned was demanded and refused, and the libellants libelled ship, freight, and cargo.

28. The ship was attached and sold by the marshal for about $4,500, and the proceeds remaining after paying off the crew and defraying cost of sale were paid into court. There was stored in the said vessel at the time of the sale a quantity of scrap copper and junk, consisting of old sails and ropes. The copper and junk were not sold with the vessel, but were afterwards sold, and the proceeds were paid into court. The copper and junk were no part of the vessel, or of her tackle, apparel, and furniture. The value of the cargo in New York was about $18,000.

29. The cargo was not perishable, and would not have been injured by being stored under cover at St. Thomas for three or four months.

30. St. Thomas is a central port, where vessels go seeking business, and to which parties requiring vessels also go. Vessels for the shipment of merchandise are always available there.

77 31. The rosewood aforesaid could have been forwarded from St. Thomas by vessels other than the Julia Blake at an expense of from $1,000 to $1,500.

32. It was for the interest of the owners of the said rosewood that it should be so forwarded rather than that it should be hypothecated to pay for repairs to the Julia Blake.

33. The libellants had the means of ascertaining the facts mentioned in paragraphs 30, 31, and 32 above, before it made the loan in question.

I find as

CONCLUSIONS OF LAW.

1st. It was the duty of the master to communicate with the owners of the cargo after its arrival at St. Thomas, and inform such owners of the probable necessity for the hypothecation of the cargo.

2. It was the duty of the lender to ascertain if such communication had been had and such information given before making a loan upon the security of the cargo.

3. No such inquiry having been made, and no such communication having been had, nor any such information given in season to enable the own-

ers to exercise the right of taking the cargo at the intermediate port, the bond in suit, as far as it purports to hypothecate the cargo, is in-
78 operative and invalid.

4. Telegraphic communication having been available, it was the duty of the master, under the circumstances before stated, to resort to it.

5. The master of the ship had not authority to hypothecate the cargo, because under the circumstances of the case it was reasonably practicable for him to communicate with the owners of the cargo, and inform them of the probable necessity for hypothecating the cargo before doing so; and inasmuch as he hypothecated the cargo under such circumstances without so communicating with and informing such owners, the bond, though given and taken bona fide, is not binding on the cargo.

6. The copper and junk were not covered by the bond.

7. The libel must be dismissed as to the cargo and as to the proceeds of the coppe' and junk, with costs of the district court and of this court against the libellant in favor of the claimants of the cargo, and with costs of this court against the libellants in favor of the claimants of the copper and junk.

SAMUEL BLATCHFORD,
Circuit Judge.

79 SCHEDULE A.

No. 1.

Telegram from Knowlton to Peter Blake, Parsboro', Nova Scotia.

Julia Blake, St. Thomas, dismasted, leaky; consigned Lamb; sending survey mail.
29, 5, 76.

No. 2.

Copy of a letter from Captain Abra'm Knowlton to Peter Blake, esq., pressed in copy book of Lamb & Co.

S. S. Beta, via Halifax.

SAINT THOMAS, 27*th May*, 1876.

PETER BAKER, Esq.,
Parsboro, Nova Scotia:

DEAR SIR: I regret to have to report that the brigantine Julia
80 Blake, on her voyage from Rio de Janiero, encountered heavy weather on the 4th inst., and for the safety of lives, vessel, and cargo, I was compelled to cut away to righten the vessel, and to put into this port, as we were in a too disabled condition to go north. A survey will be held on Monday, and I will supplement this letter by a telegram acquainting you what the surveyors recommend to be done in her present leaky and damaged state; it will likely be necessary to discharge to ascertain damage, and for new masts, &c. This mail closes at once, so I must defer giving you full particulars until next steamer.

I remain, sir, your obedient servant,
(Signed) ABRAM KNOWLTON.

No. 3.

French frigate Minerve, via Philadelphia.

ST. THOMAS, 13' *June*, 1876.

PETER BLAKE, Esq.,
Parsboro, Nova Scotia:

SIR: We have to confirm Captain Knowlton's letter to you, dated 27th ult., acquainting you that the dismasted brig Julia Blake had put in here in a leaky and disabled condition.

By surveyors' recommendation the vessel has been discharged, and is to-day on the marine repairing slip, for shipping and caulking, &c.; masts, sails, &c., are being made, and in the course of another month the Julia Blake will probably be ready for sea in a seaworthy state.

Captain Knowlton dispatched you a telegram, thus:

"Julia Blake, Saint Thomas, dismasted, leaky; consigned Lamb; sending survey mail."

81 on the 29th ult., which no doubt reached you promptly and correctly. From his not receiving any reply from you, he concluded that you wish him to follow the customary routine with documents, &c. Meantime we hand, herein, certified copy of extended protest from the "British consulate," which may interest you. No doubt your letters will state in what manner accounts here are to be paid.

We remain, sir, yours faithfully,
(Signed) LAMB & CO.

No. 4.

Alpha via Halifax.

ST. THOMAS, 22*nd June*, 1876.

PETER BLAKE, Esq.,
Parsboro, Nova Scotia:

SIR: We last wrote you on the 13th instant, via Philadelphia, with certified copy of extended protest per Julia Blake, which we trust has reached you safely.

The S. S. Alpha arrived here to-day from Halifax without bringing us any letter from you, but Captain Knowlton tells us that he had a communication, and we therefore refer you to him or his advices for particulars, in connection with the repairing and refitting of the brigantine Julia Blake.

We suppose that your next will furnish instructions regarding funds for expenses here; if you don't provide the needful, same will likely be raised by bottomry and respondentia loan, payable on arrival at New York.

The Julia Blake should be ready for sea about 15th proximo, and

We remain, sir, your obedient servants,
(Signed) LAMB & CO.

Copy pr. S. S. Alpha.

82 No. 5.

ST. THOMAS, 20' *July*, 1876.

PETER BLAKE, Esq.,
Parsboro, N. S.:

DEAR SIR: We have to acknowledge the receipt of your valued favor of 4th instant, the contents of which claim our best attention.

The Julia Blake is progressing with her repairs, and will soon be ready to take in cargo; we cannot, at present, give you any precise estimate of the expenses, as a good deal remains to be done yet, but Captain Knowlton is putting the vessel in first rate order, having at the same time regard to every practicable economy.

The case being one of "general average," the cargo will, of course, contribute its proper proportion towards expenses, and we think the documents which Captain Knowlton will take with him, will render the adjustment speedy and satisfactory to all the interests and parties concerned.

We are, dear sir, yours faithfully,

(Signed) LAMB & CO.

No. 6.

Copy of letter addressed to the shipper of cargo ex Julia Blake at Rio.

Star Ball steamer from Porto Rico.

ST. THOMAS, 1*st June*, 1876.

RIO JANEIRO:

DEAR SIR: We have to advise that the brigantine Julia Blake put in here on the 27th ult., dismasted and leaky. A survey has been held, and for effecting repairs, &c., the cargo is being discharged.

83 Captain Knowlton tells us that he has cabled the "casualty" to the United States. As the cargo is consigned "to order," we haye been unable to acquaint the New York consignees of the misfortune.

We remain, yours faithfully,

(Signed) LAMB & CO.

No. 7.

Copy of letter addressed to the shipper of cargo ex Julia Blake at Rio.

Per S. S. Nile, via Southampton.

RIO DE JANEIRO.

ST. THOMAS, 28*th September*, 1876.

DEAR SIR: Your favor of the 13th July last reached us recently via Porto Rico, and only after the Julia Blake had sailed from this port. The letter of instructions which you mention having given to Captain Knowlton on sailing from Rio has never been laid before us, nor did he produce the charter-party, although we repeatedly asked for it; he alleged that it had been mislaid or lost the time *at* the disaster at sea, and, on being questioned, denied having any instructions from you as to the consignment of vessel in case of average. The bills of lading being "to order," left us no clue as to the consignees of cargo. The casualty was, however, at once cabled to the New York Board of Underwriters.

While we regret that you should have felt any doubt as to our compliance with your wishes, it will now be clear to you how blameless we are in the matter.

Whether Captain Knowlton purposely withheld information from us,

or if he actually did lose the documents referred to, remains at present open for conjecture only, but the control intended to have been placed with us remained, in part at least, in hands of the captain, as master of the vessel.

84 We would suggest that you advise us by mail of the despatch of all vessels conveying instructions from you to our firm, in the event of their putting into this port in distress—would thus, if necessary, be able at once to take up a position with the master, and the protection of your interests at our hands can thus not be disputed or ignored.

The adoption of such a course on your part is, we think, more advisable under present circumstantial means of mail communication between Rio and St. Thomas.

We are, dear sir, yours, very truly,

LAMB & CO.

85 And at the same time the said circuit judge filed in the office of the clerk of said circuit court an opinion in writing, of which the following is a copy, to wit:

Circuit court of the United States for the southern district of New York.

THE BANK OF ST. THOMAS
vs.
THE BRITISH BRIGANTINE JULIA BLAKE.

BLATCHFORD, *J.:*

The only appeal taken in this case is one by the libellant, and is from so much of the final decree of the district court as dismisses the libel as against the cargo and the proceeds of the copper and junk, and as awards costs to the claimants of said cargo. The only question made in argument by the counsel for the libellant is as to the cargo, as no attempt has been made to show error as to the decree respecting the proceeds of the copper and junk.

There is no dispute as to the material facts in this case, as effecting the cargo. Those facts, as found by this court, were substantially found by the district court on its decision. The only question is, whether, on the facts of this case, the cargo is bound by the bond. The point involved is examined with care and thoroughness in the decision of the district

86 court, and I concur in the views there set forth. I have read the English decisions on the subject, namely, The Gratitudine (3 Ch. Rob., 240), before Sir William Scott, in the high court of admiralty, in 1801; La Ysabel (1 Dodson, 273), before the same judge, in the same court, in 1812; The Oriental (3 W. Rob., 243), before Dr. Lushington, in the same court, in 1850, reversed by the privy council in 1851 (7 Moore, 398); The Bonaparte (3 W. Rob., 298), before Dr. Lushington, in the high court of admiralty, in 1850 and 1852, and before the privy council twice, on appeal in 1851 and 1853 (8 Moore, 459); the cargo ex Sultan, before Dr. Lushington, in the high court of admiralty, in 1859 (Swabey, 504); the Hamburg (1 Browning & Lushington, 253), before the same judge, in the same court, in 1863, and before the privy council, on appeal in 1864 (Id., 265); The Karnak (Law Rep., 2 Adm. &

Ecc., 289), before Sir Robert Phillemore, in the high court of admiralty, in 1868, and before the privy council on appeal in 1869 (Law Rep., 2 P. C. app., 509); The Onward (Law Rep., 4 Adm. & Ecc., 38), before Sir Robert Phillemore, in the high court of admiralty, in 1873; and Kleinwort vs. The Cassa Marittima (Law Rep., 2 appeal cases, 156), before the privy council in 1877. The result of these cases is that it is the law of England in regard to a bottomry bond covering cargo, given by the master of the vessel, that he cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner
87 be practicable, and that such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation. In the Onward (Law Rep., 4 Adm. & Ecc., 55) Sir Robert Phillimore states it to have been the judgment of the privy council in the Oriental (7 Moore, 411) that a mere statement of injuries done to the ship, and of the consequent necessity of repairs, which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners This statement of the law is quoted on the judgment of the court in Kleinwort v. The Cassa Marittima (above cited) with the remark that the privy council entirely agrees in such view of the law. No case in the United States is cited deciding the points thus referred to. In the Eureka (2 Lowell, 417) it was doubtful whether it was open, on the pleadings, to take the objection that the master did not write sufficiently to the owners of the ship and not at all to the owners of the cargo, and the conclusion of the court was that if the English cases were of authority here they would not require the bond to be set aside.

In the present case the point is taken in the answer of the claimants of the cargo that the vessel, at the time she was in St. Thomas, was consigned to the claimants in New York, as owners of her cargo, and that she had been consigned in St. Thomas to the agents of the claimants there, as was well known to her master; that the means of speedy communication with the owner of the vessel, and with the claimants, as own-
88 ers of the cargo, as also with the charterer of the vessel and the shipper of her cargo, existed, and were well known to said master and to the libellant, and that, although such means existed, said master did not communicate with the owner of the vessel nor with the claimants, nor with either of them, relating to the execution of said bottomry; that said master had no authority or necessity for the execution of the same, as was well known to the libellant; and that the said bond having been executed without such authority or necessity therefor is void as against the vessel and her cargo.

The rule laid down in the case of the Hamburg (1 Browning & Lushington, 273) by the privy council, as deduced from the judgment of the privy council in the case of the Bonaparte (8 Moore, 473), is that "if, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt."

As to this rule, the privy council say, in the Hamburg, that they are unable to discover any novelty in it, either in the principle on which it

rests or in its application to the case of the hypothecation of the cargo of a ship by the master; that the question whether a master must communicate or not is one which can only be decided by the circumstances in each particular case, and that this principle was recognized by Sir Will-
89 iam Scott in the Gratitudine. They further say:

"As to the supposed inconvenience of the rule, their lordships do not forget that the lender of the money is the party interested in the event of the suit, and not the master. But there is no hardship in requiring from one who is about to advance a large sum of money under such circumstances, that he should enquire of the master whether he has communicated or made an attempt to communicate to the owners the circumstances of his distress, and what he proposes to do in regard to their goods. And it must be remembered, on the other hand, that the owners of the goods are equally interested, and unless communicated with have not the same means of protecting their own interests which the lender undoubtedly has. If it be said that a decision in their favor will tend to increase the difficulty of procuring loans in foreign ports for the repairs of vessels in distress, it may also be said, on the other hand, that it will tend very much to the benefit of commerce in general to discourage improvident of fraudulent advances." The reason for communicating with the owners of the cargo is well expressed by the privy council, in the case of the Hamburg, in this language: "The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with authority to give directions, on this ground—that the owners have no means of expressing their
90 wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity which creates it does not arise." In the case of the Lizzie (Law Rep., 2 Adm. & Eccc., 254) Sir Robert Phillimore, citing as authority the cases of the Gratitudine, the Bonaparte, and the Hamburg, says that if there be an opportunity for the owners of the cargo to express their will as to advancing the requisite funds or as to unloading their cargo altogether, the master, who is the agent of necessity and not of their choice, has no right to deprive them of this opportunity, and therefore must communicate with them, if it be reasonably within his power to do so. In the case of the Onward, (Law Rep., 4 Adm. & Ecc., 38) the same judge says: "When the circumstances permit, the master must communicate with the owner before he does any acts which seriously affect the value of the ship in the one case or of the cargo in the other. This is a doctrine at which the English courts have slowly but steadily arrived." This rule of the English courts seems entirely reasonable, and one which should be applied to the present case.

The master had notice that Cunningham and Sons were consignees of the cargo at Philadelphia. He made no communication to them. He might have done so by telegraph at all times, and have received a speedy answer. He made no communication to Mee. The letter of
91 of June 1, 1876, from Lamb & Co. to Mee was sent by such a route that it did not reach him till July 13th. It contained no information as to the amount of the damage to the vessel or as to the cost of the

repairs, nor did it suggest bottomry. No other communication was made to Mee. Before July 21st, a telegram would have reached him at once, and after that date in about five days.

But the master was told by his letters of instructions that Cunningham & Sons were the consignees of the whole of the cargo, and thus the proper persons to be communicated with; and if he had lost his letter of instructions, and had forgotten the name and address of the consignees, he could have learned both by communicating by telegraph with Mee. The newspaper notice of the disaster to the vessel which the claimants saw on June 2nd, was not such a notice as called upon them to act. It conveyed no suggestion that a hypothecation of the cargo was probable or intended. The other points involved, growing out of the special circumstances of this case, are fully discussed and properly disposed of, in the opinion of the district court.

As the suit is wholly upon the bond, and as the bond is void as respects the cargo for want of authority in the master, acting as agent for the owners of the cargo, to give it, it follows that the bond cannot be sustained against the cargo to any extent.

Lord, Day & Lord for the libellants McDaniel, Lummis and
92 Souther, and Butler, Stillman and Hubbard for the claimants.

And then the counsel for the libellants submitted to and filed with the said circuit judge the following conclusions of law, with the request that he should make and file the same:

First. That the facts of the disaster, as proved, constituted a case of necessity, justifying in themselves an hypothecation of ship, freight, and cargo, in the usual form, which was adopted in this case.

Second. That the master communicated promptly with his owner, and was by him authorized to raise money by bottomry, as he did.

Third. That there is no rule of admiralty law in this country, which made it the master's duty to communicate also with the owners of his cargo, and his failure to do so does not invalidate this bond.

Fourth. That even if there were such a rule, the communication made by Lamb & Co. to Mee, of Rio, the owner of 200 logs, which he received in time to have replied to by telegraph (July 14), before the execution of the bond, was sufficient to make the bond good, at least as against their portion of the cargo.

Fifth. That in like manner the notice which the claimants Cunningham received June 2, 1876, and, for a like reason, was sufficient
93 to make the bond good as to their portion of the cargo.

Sixth. That both Mee and Cunningham were themselves guilty of negligence in not communicating with St. Thomas if they wished to avoid the hypothecation of their respective portions of cargo, to which danger the circumstances, as known to them, inevitably exposed them.

Seventh. That even if the rule requiring communication with the owner of cargo were applicable in this case to the master, it could not be applied to the libellants, who were innocently ignorant of the names of such owner, and who had no means of finding them out within any reasonable time.

Eighth. That the necessity of the prosecution of the voyage was enough to justify the hypothecation of the cargo, even were it apparent that the ship and freight would be insufficient to satisfy the bond.

Ninth. That under any circumstances the bond should be held good against the cargo for everything but the maritime premium.

Tenth. That the bond should at all events be good for the proper contribution of the cargo in a general average statement, and that in making up that statement the wages already paid out of the proceeds of the ship should be taken into account, and the cargo be held liable therefor to the libellants.

94 Eleventh. That the decree should be reversed and the bond declared valid against the cargo with costs.

LORD, DAY & LORD,
Proctors for Libellants, Appellants.
GEORGE DE FOREST LORD,
Advocate.

But the said circuit judge refused to make and file any one of said eleven conclusions of law last above set forth.

And thereupon and upon notice of the filing of the said findings of fact and conclusions of law and opinion, and on his refusal to make the conclusions of law proposed on behalf of the libellants, and before the entry of any judgment or decree thereon, the libellant filed in the office of the clerk of the said circuit court, and served Messrs. McDaniel and Souther, proctors for said claimants of said cargo and the freight due thereon, with notice of filing the same, the following exceptions separately to the conclusions of law made and filed by said circuit judge, and also the following exceptions separately to the refusal of said circuit judge to make the conclusions of law submitted and proposed to him on behalf of the libellant, and which the libellant requested him to make:

95 Circuit court of the United States, southern district of New York, in the second circuit.

THE BANK OF ST. THOMAS, LIBELLANT AND appellant,
against
THE BRITISH BRIGANTINE JULIA BLAKE, HER tackle, apparel, furniture, cargo and the freight due thereon.

The libellants in the above-entitled cause except to the conclusions of law filed therein by Hon. Samuel Blatchford, circuit judge, on the 16th day of July, 1879, and also to the refusals of said circuit judge to make certain conclusions of law submitted and proposed by the libellants and which the libellants requested him to make, as follows:

First. The libellants except to the first conclusion of law filed as aforesaid and to each and every part thereof.

Second. They except to the second conclusion of law so filed and to each and every part thereof.

Third. They except to the third conclusion of law so filed and to each and every part thereof.

96 Fourth. They except to the fourth conclusion of law so filed and to each and every part thereof.

Fifth. They except to the fifth conclusion of law and to each and every

part thereof except so much thereof as concludes that the bond was given and taken bona fide.

Sixth. They except to the seventh conclusion of law and to each and every part thereof, except so much thereof as concludes that the libel must be dismissed as to the proceeds of the copper and junk with costs of the circuit court against the libellant in favour of the claimants of the copper and junk.

Seventh. The libellants except to the refusal of said circuit judge, although so requested by them, to find as a conclusion of law the first conclusion of law submitted and proposed to him by them.

Eighth. They except to the refusal of said circuit judge to find as a conclusion of law the second conclusion of law submitted and proposed to him by them.

Ninth. They except to the refusal of said circuit judge to find as a conclusion of law the third conclusion of law submitted and proposed to him by them.

Tenth. They except to the refusal of said circuit judge to find as
97 a conclusion of law the fourth conclusion of law submitted and proposed to him by them.

Eleventh. They except to the refusal of said circuit judge to find as a conclusion of law the fifth conclusion of law submitted and proposed to him by them.

Twelfth. They except to the refusal of said circuit judge to find as a conclusion of law the sixth conclusion of law submitted and proposed to him by them.

Thirteenth. They except to the refusal of said circuit judge to find as a conclusion of law the seventh conclusion of law submitted and proposed to him by them.

Fourteenth. They except to the refusal of said circuit judge to find as a conclusion of law the eighth conclusion of law submitted and proposed to him by them.

Fifteenth. They except to the refusal of said circuit judge to find as a conclusion of law the ninth conclusion of law submitted and proposed to him by them.

Sixteenth. They except to the refusal of said circuit judge to find as a conclusion of law the tenth conclusion of law submitted and proposed to him by them.

Seventeenth. They except to the refusal of said circuit judge to find as a conclusion of law the eleventh conclusion of law submitted and proposed to him by them.

98 Dated New York, August 3rd, 1879.

LORD, DAY AND LORD,
Proctors for Libellants and Appellants.

And inasmuch as the said exceptions do not appear by the record of the decree of said circuit court, the proctors for said libellant have prepared and caused this bill of exceptions, upon due notice to the proctors of said claimants of said cargo, and the freight due thereon, to be settled as a record thereof, according to the form of the statute in such case made and provided and the practice of the court, and to be signed and filed nunc pro tunc as of the third day of August, 1879.

[L. S.] SAMUEL BLATCHFORD,
Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. The Bank of St. Thomas against The Julia Blake, &c. Bill of exceptions. Lord, Day & Lord, proctors for libellants, 120 Broadway, New York. Filed this 18 day of Feb'y, 1880, nunc pro tunc as of Aug. 3d, 1879. John I. Davenport, clerk.

99 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States court-rooms, in the new post-office building in the city of New York, on the 2d day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, honorable Samuel Blatchford, circuit judge.

THE BANK OF ST. THOMAS, LIBELLANTS AND appellants,
vs.
THE BRITISH BRIGANTINE JULIA BLAKE, her tackle, apparel, furniture, cargo, and the freight due thereon, Wm. T. Cunningham & others, claimants of said cargo, & Peter Blake, claimant of said brigantine, claimants & appellants.

100 This cause coming on to be heard on the appeal of the Bank of St. Thomas, the libellant above named, from the final decree of the district court of the United States for the southern district of New York, dismissing the libel as to the claimants of the cargo, with costs to be taxed against the libellant, and also dismissing the libel as to the proceeds of the copper and junk sold from the said brigantine, and having been heard on the pleadings and proofs in the district court, and on further proofs taken in this court, and having been argued by George Deforrest Lord, esq., advocate for the libellant and appellant, and Everett P. Wheeler, esq., advocate for the appellees, the claimants of cargo, and by Thomas
101 E. Stillman, esq., advocate for the appellees, the claimant of the copper and junk, and due deliberation having been had in the premises:

Now, on motion of McDaniel & Souther, proctors for said appellees, the claimants of cargo:

It is ordered, adjudged, and decreed that the said final decree of the district court be, and the same hereby is, in all things affirmed, and that the said libel be, and that it hereby is, dismissed as to the said cargo, with costs, and that William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, owners and claimants of said cargo, recover against the Bank of St. Thomas fifty-eight $\frac{94}{100}$ dollars, their costs as taxed in said district court, as in and by the said final decree of said court it was provided that said claimants have against said libellant, to-
102 gether with the costs of said claimants on the appeal to this court, as taxed, amounting to the further sum of two hundred and twenty & $\frac{30}{100}$ dollars, and in all amounting to the sum of two hundred and seventy-nine $\frac{24}{100}$ dollars.

And it is further ordered, adjudged, and decreed that the said libel be, and that it hereby is, dismissed as to the said copper and junk, with costs,

and that the proceeds arising from the sale of the said copper and junk, now in the registry of this court, be paid by the clerk to Peter Blake, the claimant of the said brigantine, or to Butler, Stillman & Hubbard, his proctors, and that the said Peter Blake recover of the libellant, the Bank of St. Thomas, the sum of seventy-nine and $\frac{40}{100}$ dollars, the amount of his costs in this court, as taxed.

103 And it is further ordered that unless this decree be fulfilled or ratified, or unless proceedings thereon be stayed on appeal, by taking appeal and filing security within the time limited by law and by the rules and practice of this court, Benjamin F. Butler, the stipulator for costs on the appeal to this court, cause the engagements of his stipulation to be performed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against him, his goods, chattels, and lands.

SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of N. Y. The Bank of St. Thomas against the brigantine Julia Blake, &c., her cargo,
104 &c. Copy final decree. McDaniel & Souther, proctors for cl'm'ts of cargo, 8 & 10 Pine st., New York.

Gent'n: Please to take notice that a decree, of which the within is a copy, will be presented for settlement to Hon. Samuel Blatchford, at his chambers in the new P. O. building, in the city of New York, on the 31st inst., at 11 o'c'k a. m. of that day.

Dated N. Y., July 28th, 1879.

Yours, &c.,

McDANIEL & SOUTHER,
Proctors for Cl'm'ts of Cargo.

To Messrs. LORD, DAY & LORD,
Proctors for Libellants.

Due service of a copy of a decree of which the within is a copy, together with a notice of which that endorsed hereon is a copy, is hereby admitted.

Dated N. Y., July 20, '79.

LORD, DAY & LORD,
Libellants' Proctor.

Within decree is hereby approved as to form.

N. Y., July 21, '79.

LORD, DAY & LORD,
Libellants' Proctor.

105 U. S. circuit court. Filed *filed* August 2d, 1879. John I. Davenport, clerk.

106 U. S. circuit court, southern district of New York, second circuit.

THE BANK OF ST. THOMAS
against
THE BRITISH BRIGANTINE JULIA BLAKE, HER tackle, &c.

We hereby consent as follows:

1st. That the exceptions presented herewith may be served and filed

nunc pro tunc, that is to say, as of the date of entry of the decree herein in the circuit court, to wit, the 3d day of August, 1879.

2nd. That the bill of exceptions also presented herewith may be signed, sealed, and filed as the settled bill of exceptions herein, also nunc pro tunc as of said 3d day of August.

3d. That the findings of the circuit judge in this case be amended
107 as follows, viz: So that the 15th finding shall read as follows:

"15. Thereupon the correspondence of which copies are set forth in Schedule A, hereto annexed, passed between the parties in interest."

And so as to take in at the end of said findings in schedule marked A the correspondence set forth on pages 167 to 172 of the printed record in said circuit court.

Dated N. Y., Feb'y 16, 1880.

McDANIEL & SOUTHER,
Proctors for Appellees.
LORD, DAY & LORD,
Proctors for Appellant.

108 At a term of the circuit court of the United States, held at the court-rooms thereof, in the city of New York, on the day of February, 1880.

Present, Samuel Blatchford, circuit judge.

THE BANK OF ST. THOMAS
against
THE BRITISH BRIGANTINE JULIA BLAKE, HER tackle, &c.

On reading and filing the annexed consent, and on motion of the libellant's proctors, it is ordered,

1st. That the exceptions referred to in said consent may be served and filed nunc pro tunc as of the 3d day of August, 1879.

2nd. That the bill of exceptions therein referred to may and it is signed, sealed, and filed as the settled bill of exceptions herein also
109 nunc pro tunc as of said 3d day of August.

3d. That my findings in this case be amended as follows:

So that the 15th finding shall read as follows: 15. "Thereupon the correspondence, of which copies are set forth in Schedule A, hereto annexed, passed between the parties in interest."

So as to take in at the end of said findings in schedule marked A the correspondence set forth on pages 167 to 172 of the printed record in said circuit court.

SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court s. district of N. Y. The Bank of St. Thomas ag'st The British Brigantine Julia Blake. Consent & order. Lord, Day & Lord, proctors for appellants, 120 Broadway, New York. U. S. circuit court. Filed Feb'y 18, 1880. John I. Davenport, clerk.

110 Circuit court of the United States, second circuit, southern district of New York.

THE BANK OF ST. THOMAS, APPELLANT,
against
THE BRITISH BRIGANTINE JULIA BLAKE, HER tackle, apparel, furniture, cargo, and the freight due thereon, William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, claimants of said cargo, appellees.

To the honourable the Supreme Court of the United States:

The appeal of The Bank of St. Thomas, the above-named libellant and appellant, respectfully showeth that on or about the 31st day of August, 1876, it filed its libel in the district court of the United States for the southern district of New York against the said The British Brigantine Julia Blake, her tackle, apparel, furniture, cargo, and the freight due thereon, in a cause, civil and maritime, claiming to recover the sum of thirteen
111 thousand two hundred and twenty-four dollars, American gold coin, with interest thereon at the rate of seven per cent. per annum from the 30th day of August, 1876, on a certain bottomry and respondentia bond, made and executed by Abram Knowlton, master of said brigantine, to the said libellants, at Saint Thomas, West Indies, on the 5th day of August, 1876, and that thereupon Peter Blake, intervening as owner of said brigantine, filed claim against her and her tackle, apparel, & furniture.

And Winthrop Cunningham and William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, intervening as owners of the cargo of said brigantine likewise filed their claim against the same.

That on the 15th day of November, 1876, the libellants filed an amended libel, claiming the same recovery as in said original libel, and that on or about the 9th day of December, 1876, the answers of said claimants of said brigantine and her cargo were also filed, praying that said libel might be dismissed with costs.

That on the 11th day of October, 1876, said brigantine was sold under due process of said district court for the sum of four thousand five hundred dollars, which was paid into the registry of said district court.
112 That subsequently certain copper and junk belonging to said brigantine were also sold under like process, and the proceeds of said sale are now in the registry of said district court.

That the cargo of said brigantine, consisting of five hundred and eighty-two logs of rosewood, was not sold, the claimants thereof having secured the claim of the libellant by a deposit of United States bonds in conformity with an agreement made by them with the libellant's agents.

That such proceedings were had in said cause that, on the 23rd day of August, 1878, a final decree was made & pronounced therein by said district court, wherein it was, among other things, in substance adjudged that the proceeds of the sale of said brigantine in the registry, after paying the expenses of sale and the clerk's and marshal's fees, be paid to the proctors of the libellant to be applied, so far as the same would go, to the payment of the libellant's costs, and the amount due on the said bond in the libel mentioned; that the claimants of the cargo of said brigantine pay to the

libellants the sum of four hundred and fifty dollars and twelve cents
113 gold coin of the United States, being the balance of the freight due on said cargo, and that after deducting their costs the said sum of four hundred and fifty dollars and twelve cents, so far as the same might go should also be applied to the payment of the amount due on said bond, and that the libel be dismissed as to the cargo and the claimants thereof with costs against the libellant, and also as to the proceeds of the copper and junk sold from said brigantine, and that said proceeds be paid to the claimants of said brigantine.

That after paying the expenses of the sale of said brigantine, and the fees and disbursements of the marshal and clerk of said district court, and also the amounts of certain decrees made upon libels filed for seamen's wages, therein directed to be first paid out of the proceeds of sale of said brigantine, the sum of three thousand two hundred and fourteen dollars, principal, with two hundred and thirty-five dollars and forty-four cents accumulated interest, making in all the sum of three thousand four hundred and forty-nine dollars and forty-four cents remained out of said proceeds, which the libellants have received on account of their costs and the amount due on said bond.

114 And this appeal further showeth that after said final decree of said district court, said libellant duly appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from such portions of said decree as dismissed said libel as against said cargo, and the proceeds of said copper and junk so sold, and which awarded costs to the claimants of said cargo, and the said cause was removed thereupon into said circuit court, and there tried anew, and such proceedings were had in said circuit court that afterwards, on the 2nd day of August, 1879, said circuit court made a final decree in said cause, whereby it was, among other things, decreed that said final decree of said district court be affirmed and said libel dismissed as to said cargo, with costs, and that William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, claimants of said cargo, recover of the libellants their costs in said district court, to wit, the sum of fifty-eight $\frac{94}{100}$ dollars, and their costs in said circuit court, to wit, the sum of two hundred and twenty $\frac{30}{100}$ dollars, making in all the sum of two hundred and seventy-nine $\frac{24}{100}$ dollars, and that said libel be also dismissed as to the said copper and junk, with seventy-nine $\frac{40}{100}$ dollars costs to the claimants thereof.

115 And this appeal further showeth that said decree of said court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore this appellant appeals to the Supreme Court of the United States from such portions of said decree of said circuit court as affirm the parts of said decree of said district court dismissing said libel as against said cargo and awarding costs to the claimants thereof, and further, from such portions of said decree of said circuit court as dismiss said libel as to said cargo and award costs to the claimants thereof; and this appellant respectfully prays that the decree of said circuit court and the libels, answers, pleadings, depositions, evidence, and proceedings in the said cause may be sent to said Supreme Court of the United States without delay, and that said Supreme Court will proceed to hear said cause anew, and that the portions of said decree of the circuit court herein above referred to may be reversed and a decree made sustaining said libel as

against said cargo, and directing that the balance due on the bond mentioned in said libel may be paid out of the proceeds of said cargo, or such other decree as to the said Supreme Court shall seem just, and that
116 the appellees may be decreed to pay to the appellant its costs and damages in the premises.

Dated New York, October 21, 1879.

LORD, DAY & LORD,
Proctors for Appellant.

GEORGE DE FOREST LORD, *Advocate.*

The foregoing appeal is hereby allowed.
December 15th, 1879.

SAM'L BLATCHFORD.

117 (Indorsed:) U. S. circuit court, southern dis't of N. Y. The Bank of St. Thomas ag'st the British brigantine Julia Blake, her tackle, &c. Copy. Appeal to the Supreme Court of the United States. Lord, Day & Lord, app'l'nts, proctors, 120 Broadway, New York. George De Forest Lord, advocate.

Service of a copy is hereby admitted.
Oct. 21, 1879.

McDANIEL & SOUTHER,
Proct's for Cl'm'ts of Cargo.

U. S. circuit court. Filed Oct. 21, 1879. John I. Davenport, cl'k.

118 Circuit court of the United States, southern district of New York, in the second circuit.

THE BANK OF ST. THOMAS, APPELLANT,
against
THE BRITISH BRIGANTINE JULIA BLAKE, HER tackle, apparel, furniture, cargo, and freight due thereon, William T. Cunningham, Graham P. Cunningham, & Winthrop R. Cunningham, claimants of said cargo, appellees.

Know all men by these presents that we, the Bank of St. Thomas, of the Island of St. Thomas, in the West Indies, and Robert Gordon, of the city of Newark, and Benjamin F. Butler, of Scarsdale, Westchester
119 County, New York, are held and firmly bound unto the above-named William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, appellees, in the sum of one thousand ($1,000) dollars, to be paid to the said appellees, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals and dated the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas the above-named appellant has prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse certain parts of the decree rendered
120 in the above suit by the circuit court of the United States for the southern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

BANK OF ST. THOMAS,
By MAITLAND, PHELPS & CO., [L. S.]
Agent,
By ROBT. GORDON.
ROBERT GORDON. [L. S.]
B. F. BUTLER. [L. S.]

Sealed and delivered and taken and acknowledged the 28th day of October, 1879, before me—

FREDERIC W. ADEE.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

On the 28th day of October, 1879, before me came Robert Gordon and Benjamin F. Butler, known to me to be the individuals described in
121 and who executed the foregoing instrument; and the said Robert Gordon being further known to me to be one of the agents of the Bank of St. Thomas, said appellant, at this port, and they thereupon severally acknowledged that they had executed the same.

[L. S.] FREDERIC W. ADEE,
Notary Public N. Y. City & Co.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert Gordon and Benjamin F. Butler, being duly sworn, depose and say and each for himself saith that he is worth the sum of two thousand ($2,000) dollars over and above all his just debts & liabilities and property exempt by law from execution.

ROBT. GORDON.
B. F. BUTLER.

Sworn to before me this 28th day of October, 1879, by both said affiants.

FREDERIC W. ADEE,
Notary Public N. Y. City & Co.

122 (Endorsed:) Circuit court of the United States, southern district of New York, in the second circuit. The Bank of St. Thomas ag'st The Brish brigantine Julia Blake, her tackle, &c. Security on appeal to U. S. Supreme Court. Lord, Day & Lord, ap'l'ts proctors, 120 Broadway, New York.

I approve of the within bond as to form, amount, & sufficiency of sureties.

N. Y., Dec. 15th, 1879.

SAM'L BLATCHFORD.

U. S. circuit court. Filed Dec. 15th, 1879. John I. Davenport, clerk.

123 By the Hon. Samuel Blatchford, justice of the circuit court of the United States for the southern district of New York, in the second circuit.

To William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham:

Whereas the Bank of St. Thomas, libellant of the British brigantine, Julia Blake, her tackle, apparel, furniture, cargo, and the freight due thereon has appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, in favor of the said William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, and has filed security required by law: You are
124 therefore hereby cited to appear before the said Supreme Court at the city of Washington, in the District of Columbia, on the second Monday of October, 1880, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of *the* New York, in the southern district of New York. in the second circuit, on the fifteenth day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

SAM'L BLATCHFORD.

(Endorsed:) Circuit court of U. S., southern dist. of N. Y. The Bank of St. Thomas agst. The British Brigantine Julia Blake, her tackle,
125 &c. Citation to Supreme Court of U. S. Lord, Day & Lord, proctors for libe'l't app'l'n't, 120 Broadway, New York.

Service of the within citation is hereby admitted.
N. Y., Dec. 16, 1879.

McDANIEL & SOUTHER,
Proctors for Claimants of Cargo.

U. S. circuit court. Filed Jan'y 9, 1880. John I. Davenport, clerk.

We hereby severally consent that the foregoing shall constitute the return to and record in the U. S. Supreme Court in this cause.
N. Y., Feb'y 26, 1880.

LORD, DAY & LORD,
Proctors for Appellant.
McDANIEL & SOUTHER,
Proctors for Appellees.

126 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred & twenty-five inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of The Bank of St. Thomas, appellant, against The British Brigantine Julia Blake, her tackle,

apparel, furniture, cargo, and the freight due thereon, William T. Cunningham, Graham P. Cunningham, and Winthrop R. Cunningham, claimants of said cargo, appellees, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26th day of February, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 189. The Bank of St. Thomas, appellant, vs. The British Brigantine Julia Blake, her tackle, &c., William T. Cunningham & al., claimants. S. New York, C. C. U. S. Filed 28th February, 1880.

(Stamped:) Office Supreme Court U. S. Filed Feb. 28, 1880. D. W. Middleton, clerk.

2701——5